80-848

Supreme Court, U. S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PIPER AIRCRAFT COMPANY, *Petitioner,*

v.

GAYNELL REYNO, *et al., Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether, in an action in federal district court brought by foreign plaintiffs against American defendants, the plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied if the case were litigated in the district court is more favorable to them than the law that would be applied by the courts of their own nation.[1]

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[1] Parties to the proceeding in the United States Court of Appeals for the Third Circuit were: Gaynell Reyno, as personal representative of the Estates of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott; Piper Aircraft Corporation; and Hartzell Propeller, Inc. Petitioner Piper Aircraft Corporation is a subsidiary of Bangor Punta Corporation. Piper Aircraft Corporation has no subsidiaries or affiliates.

Hartzell Propellor, Inc. is only nominally a Respondent to this Petition and is filing its own Petition for a writ of *certiorari* to review the judgment below.

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OPINION BELOW

The opinion of the Court of Appeals (App. A *infra*, pp. 1a-38a) is not yet reported. The opinion of the District Court (App. C *infra* pp. 1c-21c) is reported at 479 F.Supp. 727 (D.C. Pa. 1979).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on July 24, 1980 (App D *infra* p. 4a), and amended by order dated September 15, 1980. (App. B *infra* pp. 1b-2b). A timely petition for rehearing *en banc* was denied on August 27, 1980 (Appendix E *infra* p. 1e). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This suit is a foreign-soil aircraft accident action arising out of a commercial flight between points in Great Britain and Scotland which crashed on July 27, 1976 in mountainous terrain near Talla, Scotland. All six persons aboard the aircraft were killed. The decedents, as well as their heirs and next of kin, were Scottish citizens and residents. The aircraft involved, a Piper Aztec, was piloted by a Scottish citizen and resident acting in the course of his employment with a Scottish air taxi service, McDonald Aviation Limited, which leased and operated the aircraft at the time of the accident. The aircraft was registered in Great Britain and was owned and maintained by another Scottish concern, Air Navigation Ltd.

On July 21, 1977, Gaynell Reyno, a California resident, brought this suit on behalf of five of the six Scottish decedents, William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott, in the California Superior Court against Petitioner, Hartzell Propeller, Inc. ("Hartzell") and Avco Lycoming.[1] Respondent Reyno is not

[1] Avco Lycoming was dismissed with the consent of the Respondent on November 29, 1977 by order of the United States District Court for the Central District of California.

related to the decedents or their heirs and next of kin, the real parties in interest and, as such, would not be entitled to represent the decedents under Scottish law. The complaint asserts a wrongful death cause of action based on American law, as the law of Scotland does not recognize such a cause of action, based on American products liability theories, also not recognized under Scottish law, and on negligence claims, which are recognized in Scotland. Petitioner and Hartzell denied liability, contending, *inter alia*, that the accident was the result of pilot error and/or improper maintenance and repairs by McDonald Aviation Limited and Air Navigation Ltd., Scottish third parties who are beyond the jurisdiction of the American courts. The action was removed to federal court on the basis of diversity jurisdiction under 28 U.S.C. § 1332(a) pursuant to 28 U.S.C. § 1441. On November 23, 1977, Petitioner moved to transfer the action to Pennsylvania, which motion was granted over Respondent's strenuous objections as to the convenience and fairness of the Middle District of Pennsylvania. Upon further consideration of the case, particularly facts which were discovered only after the transfer of the action to Pennsylvania, Petitioner and Hartzell moved to dismiss or for judgment on the pleadings on the grounds of *forum non conveniens* in May, 1978. Petitioner's motion was supported by a list of the witnesses which it would call. (App. F *infra* 1f-3f).

After careful consideration of the case, and the affidavits submitted by the parties, the District Court dismissed the action on the grounds of *forum non conveniens*, on the basis of the public and private interests identified by this Court in *Gulf Oil Corporation* v. *Gilbert*, 330 U.S. 501 (1947). (App. C. *infra* pp. 1c-21c). The dismissal was conditioned on the stipulation of the

defendants below that they would agree to their joinder as defendants in a Scottish suit brought on behalf of the Plaintiff's beneficiaries and to waive any statute of limitations defense arising after the date of the institution of the instant action.

In terms of the private interests of the parties, the District Court relied heavily on the fact that the suit was brought on behalf of Scottish nationals, not American citizens, in a forum which was not their home forum. Since the real parties in interest were not American citizens and had not chosen their home jurisdiction, the District Court afforded their choice of an American forum less weight than an American plaintiff's preference to sue in his own home jurisdiction.

Another factor found to counsel strongly in favor of dismissal by the District Court was the fact that virtually all of the contacts with the suit were in Scotland. These contacts included the fact that the suit arose out of the death of Scottish citizens, that the accident occurred in Scotland, that the aircraft was operated and maintained by a Scottish company and owned by another Scottish company, that the pilot of the fatal flight was Scottish, that the aircraft had been registered, serviced and maintained in Great Britain for at least seven years before the accident, that the decedents' estates would be administered in Scotland and that any economic loss to the real parties in interest occurred in Scotland and any monetary recovery would be spent in Scotland for their benefit. In contrast, the only contact the United States had with the controversy was the manufacture of the aircraft and propeller in Pennsylvania and Ohio, respectively, more than ten years ago.

The Court reasoned further that all of the evidence of damages lay in Scotland, and virtually all of the

evidence relating to Petitioner's and Hartzell's defenses, as well as Respondent's claims, was located in Scotland. These Scottish witnesses and documents would not only be difficult and costly to transport to the United States, but also would be beyond the compulsory process of American courts if voluntary cooperation was refused. Further, the British Department of Trade Investigation had conducted an extensive investigation into the accident, including three weeks of adversary hearings in Edinburgh, Scotland, at which hearings the decendents' heirs and next of kin and the defendants in this action were represented by counsel, and the remains of the wreckage are in the custody and possession of the British Department of Trade. The presence of virtually all of the evidence of both liability and damages in Scotland and the absence of compulsory process to obtain the Scottish witnesses and documents for a trial in the United States, as well as Scotland's substantial investment of time and effort in the case, was another private interest factor the District Court determined weighed heavily in favor of dismissal.

The District Court also relied on the fact that this accident was the subject of two other, duplicative suits in the foreign jurisdiction and that there were necessary third party defendants who could not be joined in this suit but who could be joined in Scotland, and were even parties to the pending foreign actions, as factors strongly favoring dismissal of the American suit in favor of consolidation of the litigation in Scotland. A second action was filed in Great Britain in July, 1978 against Piper Aircraft Corporation, Hartzell Propeller, Inc., Air Navigation and Trading Company, Ltd. and McDonald Aviation, Limited by the representatives of the pilot, the one person aboard the aircraft who is not represented in this action. In addition, the Scottish heirs and next of kin of the Scottish decedents on whose behalf this action

is brought have brought a civil action in their home forum, Scotland, against the two Scottish companies involved, Air Navigation and Training, Ltd. and McDonald Aviation Limited. These are the necessary third party defendants who Petitioner and Hartzell claim may be responsible for the accident but cannot be joined in this action.

In terms of the public interest, the District Court, after determining that Scottish and Pennsylvania law would govern different issues in the case, was concerned with the confusion that would arise from the application of different substantive law to the different parties in the same case and the burden on the local courts and communities of trying a Scottish aircraft case in which they had little interest. The Court rejected the Respondent's claim that the possibility that Scottish courts would apply Scottish law to the Scottish beneficiaries' claims, which law was less favorable to the Scottish beneficiaries' chances of recovery, if the suit was dismissed, precluded a *forum non conveniens* dismissal, noting:

> That the law of Scotland is not as helpful to the real parties in interest is not a weighty consideration. We must determine which forum is proper because of convenience and the interests of justice and the decision cannot be correctly made if the amount of a plaintiff's likely award is given undue weight. Generally, the cases that have been dismissed on the ground of *forum non conveniens* all involve situations where a party enters a forum with the hope of seeking more liberal rules of recovery. If the foreign law that ought to govern a case does not protect its citizens as fully as the law of the dismissing forum, that is a matter to be dealt with in the foreign forum. (App. C *infra* p. 20c).

The Court of Appeals for the Third Circuit reversed the District Court and remanded the case for trial. The Court below held that the District Court erred in considering the nationality of the real parties in interest and by applying a less stringent burden of proof in a suit brought on behalf of foreign nationals than that which applies to a suit brought by American citizens, determining that the nationality of the plaintiff or the real parties in interest was irrelevant to the merits of a *forum non conveniens* dismissal. With respect to the balance of the public and private interests, the Court eschewed reliance on the established factors in favor of a new factor held to be determinative of a *forum non conveniens* motion and, as a result, concluded that the District Court had erred in its balance of the interests. Although the Court below noted the factors set forth in *Gulf Oil Corporation* v. *Gilbert, supra*, the Court gave little, if any, weight to the traditional *forum non conveniens* factors, relying instead on the effect of a *forum non conveniens* dismissal on the plaintiff's chances of recovery. Having determined that under the applicable choice of law rules,[2] American law would be applicable to the plaintiff's claims if these claims were tried in American courts and that American law was more favorable to the plaintiff's chances of recovery than Scottish law, the law of the decedents' home forum, because Pennsylvania law

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[2] A federal court exercising diversity jurisdiction must apply the choice of law rules of the forum state. *Klaxon Co.* v. *Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). Where, as here an action has been transferred pursuant to 28 U.S.C. § 1404(a), the transferee court must apply the law of the state of the transferor forum. *Van Dusen v. Barrack*, 376 U.S. 613 (1964). In the instant case, this rule led to the application of California choice of law rules to plaintiff's claims against Piper and Pennsylvania rules to those against Hartzell. The Circuit Court determined that under both rules, American, not Scottish, law would apply to the case.

recognizes products liability theories and wrongful death causes of action not recognized under Scottish law, the Court concluded:

> But this Court has held that a dismissal for forum non conveniens, like a statutory transfer, "should not, despite its convenience, result in a change in the applicable law."[1] Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified. (App. A, *infra* pp. 22a-22b).

REASONS FOR GRANTING THE WRIT

The Third Circuit Court of Appeals held that a foreign citizen has an absolute right to maintain a suit in a federal district court, essentially without regard to whether the foreign citizen's home jurisdiction is the more fair or convenient forum, whenever American law is more favorable or generous to the foreign plaintiff than is the law of his own jurisdiction. This novel conclusion squarely conflicts with this Court's decision in *Canada Malting Co., Ltd.* v. *Paterson Steamships*, 285 U.S. 413 (1932), a decision which has been explicitly followed by the Second Circuit in *Fitzgerald* v. *Texaco, Inc.*, 521 F.2d 448 (2nd Cir. 1975), *cert. denied* 423 U.S. 1052 (1976). The decision below also conflicts in principle with the standards established by this Court and by

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[1] The Circuit Court was quoting a prior decision, *DeMateos* v. *Texaco, Inc.*, 562 F.2d 895, 899 (3rd Cir. 1977), *cert. denied*, 535 U.S. 904 (1978). In *DeMateos*, a *forum non conveniens* dismissal was affirmed only after the Third Circuit determined that a dismissal would not impair the foreign plaintiff's chances of recovery because under the choice of law rules of the forum state, foreign law would apply to the foreign plaintiff's claims.

the other Courts of Appeals for the application of the doctrine of *forum non conveniens*.

The issue posed by this case bears significantly on the power of federal courts to decline to exercise jurisdiction over foreign controversies, the litigation of which belongs in a foreign forum. This Court should grant review in order to resolve the conflict created by the decision below and to determine whether federal courts must leave their doors permanently open to forum shopping by foreign plaintiffs.

1. The decision of the Court below directly conflicts with this Court's decision in *Canada Malting Co., Ltd.* v. *Paterson Steamships, supra*. In *Canada Malting* the libellant had contended that the action could not be dismissed for *forum non conveniens* because a dismissal would work a change in the law governing the case from American law to Canadian law, which law was the law of the libellant's home forum and was less favorable to its chances of recovery. The respondent argued that dismissal was not precluded because foreign law would apply to the libellant's claims even if the suit were tried in American courts. This Court affirmed the dismissal without resolving the question of what law would govern the case and hence, without resolving whether a dismissal would result in a change in the applicable substantive law, thereby sanctioning the granting of *forum non conveniens* dismissals irrespective of the effect of a dismissal on the law applicable to the case or the plaintiff's chances of recovery and affirming the propriety of a *forum non conveniens* dismissal despite such claims as to an adverse effect on the plaintiff's chances of recovery. The Court stated, "[w]e have no occasion to inquire by what law the rights of the parties are governed as we are of the opinion that, under any view of that question, it

lay within the discretion of the District Court to decline to assume jurisdiction over the controversy." 285 U.S. at 419-420.

The decision of the Court below is also in direct conflict with the decision of the Second Circuit Court of Appeals[4] in *Fitzgerald* v. *Texaco, Inc., supra,* which also involved a suit on behalf of foreign nationals against an American corporation. There, as here, the plaintiff had claimed that a suit could not be dismissed under the *forum non conveniens* doctrine if the law of the alternate, foreign forum is less favorable to the plaintiff's chances of recovery. The Second Circuit rejected this argument, stating:

> A district court has discretion to dismiss an action under the doctrine of *forum non conveniens*, however, even though the law applicable in the alternative forum may be less favorable to the Plaintiff's chance of recovery. *Canada Malting Co., Ltd.* v. *Paterson Steamships*, 285 U.S. 413, 418-20, 52 S. Ct. 413, 76 L.Ed. 837 (1932). A contrary holding would emasculate the doctrine, for a plaintiff rarely chooses to bring an action in forum, especially a foreign one, where he is less likely to recover. *Id.* at 453.[5]

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[4] The *forum non conveniens* cases now appear to be concentrated in the Second and Third Circuits. See *Alcoa Steamships Co., Inc.* v. *M/V Nordic Regent,* No. 78-7054 (2nd Cir., February 25, 1980). Unfortunately, the two circuits have adopted very different, inconsistent approaches to the *forum non conveniens* doctrine. The Third Circuit has adopted a liberal approach to the exercise of federal diversity jurisdiction over foreign controversies, while the Second Circuit has been more restrained in the exercise of its jurisdiction in such cases, granting *forum non conveniens* dismissals more liberally. *Alcoa Steamships Co., Inc.* v. *M/V Nordic Regent, supra.*

[5] At least one district court in the Ninth Circuit has also held that the effect of a *forum non conveniens* dismissal on a foreign plaintiff's chances of recovery is irrelevant to the merits of the dismissal. *Michell* v. *General Motors Corporation,* 439 F. Supp. 24 (N.D. Ohio 1977).

The decision of the Court below that the district court never has any discretion to dismiss a suit for *forum non conveniens* when the law of the alternate, foreign forum is less favorable to the plaintiff squarely conflicts with this decision of the Second Circuit. This Court has criticized the insistence on the application of American law, particularly to foreign claims or foreign plaintiffs, as an unnecessarily parochial, ethnocentric approach. In *M/S Bremen* v. *Zapata Off-Shore Company*, 407 U.S. 1 (1972), the Court stated, relative to the enforceability of forum selection clauses calling for the trial of a case in a foreign forum, that "we cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." 407 U.S. at 9. The Court also rejected the argument that the forum clause was contrary to American public policy because the designated forum, England, would enforce an exculpatory clause, which American courts would not enforce for public policy reasons. 407 U.S. at 15-16. Thus, the Third Circuit's decision in this case also conflicts in principle with this decision of the Court that the applicable substantive law and the plaintiff's chances of recovery are not appropriate considerations in determining the proper venue for the trial of foreign controversies.

Moreover, by showing a special solicitude for foreign plaintiffs seeking to exploit the differences between American law and the law of their own country, the Court below significantly departed from the direction pointed by the decisions of this Court in cases involving the doctrine of *forum non conveniens*. This Court has held that a foreign plaintiff's choice of an American forum is not entitled to the same weight as an American plaintiff's choice of an American forum, and is certainly

not entitled to any significant weight. In both *Swift & Co. Packers* v. *Compania Colombiana Del Caribe*, 339 U.S. 684 (1950) and *Canada Malting Co., Ltd.*. v. *Paterson Steamships, supra*, the Court distinguished suits brought on behalf of foreign nationals from suits by American citizens in balancing the *forum non conveniens* factors, requiring a much stronger balance of the public and private interests in favor of the dismissal if the suit was brought on behalf of an American plaintiff who would be forced to sue in a foreign country if the American suit were dismissed than in a suit brought on behalf of foreign nationals. In *Swift & Co. Packers* v. *Compania Colombiana Del Caribe, supra*, an admiralty action brought by an American company against a foreign concern, the Court held that the application of the *forum non conveniens* doctrine to a suit by an American plaintiff brings into consideration different factors than those in suits between foreign nationals, stressing the significance of the fact that the plaintiff had chosen its home jurisdiction as the forum for the suit. 339 U.S. at 697.

The refusal of the Court below to afford less weight to the Scottish heirs' and next of kins' selection of a forum foreign to them is also inconsistent with the Court's reasoning in *Koster* v. *Lumbermens Mutual Casualty Company*, 330 U.S. 518 (1947). In *Koster*, the Court reviewed the rationale for deferring to a plaintiff's choice of forum, and declined to give the plaintiff's choice such deference where these reasons were not present. As in *Koster*, the reasons for affording the plaintiff's choice of forum deference, such as the convenience and related benefits to the plaintiff from a suit in his home forum, are not present here, such that the plaintiff's choice of forum should have been given little, if any, weight by the Court below.

The decision of the Court below relative to the significance of the citizenship of the real parties in interest is also in direct conflict with the decisions of the Second and Ninth Circuits applying the *forum non conveniens* doctrine. The Second Circuit has distinguished suits brought by Americans in American courts where the application of this doctrine would relegate an American to a foreign court from suits brought by a foreign plaintiff where declining to exercise jurisdiction would remit the foreign plaintiffs to their remedies in their own courts. The Second Circuit has held that the balance of factors must be much stronger in the former cases than in the latter. *Olympic Corporation* v. *Societe Generale*, 462 F.2d 376, 378 (2nd Cir. 1972); *see Farmanfarmaian* v. *Gulf Oil Corporation*, 588 F.2d 880, 882 (2nd Cir. 1978).[6]

In *Paper Operations Consultants International Ltd.* v. *SS Hong Kong Amber*, 513 F.2d 667 (9th Cir. 1975), the Ninth Circuit Court of Appeals stressed that one of the "foremost factors" in favor of the refusal to exercise

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[6] The Second Circuit has permitted one exception, which applies where there is a treaty between this country and the foreign plaintiffs' country guaranteeing the foreign plaintiff access to American courts on terms no less favorable than those afforded American citizens. Where such a treaty is brought to the court's attention, the Second Circuit affords the foreign plaintiff's choice of an American forum the same weight given an American's choice. *Alcoa Steamship Co., Inc.* v. *M/V Nordic Regent, supra*; *Farmanfarmaian* v. *Gulf Oil Corp., supra*. No such treaty is involved in the instant case. The Court below was aware of the Second Circuit's rule, but attempted to circumvent the conflict with a footnote stating that *Olympic Corp.* v. *Societe Generale, supra*, had apparently been overruled *sub silento* by *Alcoa Steamship Co., Inc.* v. *M/V Nordic Regent, supra*. This is not an accurate explanation of *Alcoa Steamships Co., Inc.* v. *M/V Nordic Regent, supra*, as the Court there and in *Farmanfarmaian* v. *Gulf Oil Corporation, supra*, clearly affirmed the rule of *Olympic*, only limiting its applicability in cases where it would conflict with this country's treaty obligations.

the court's jurisdiction therein was the fact that the parties were foreign nationals. *Id.* at 672.

The Court below has created a new, preclusive test for the application of the doctrine of *forum non conveniens*, a test that has no sanction in this Court's prior decisions. The plaintiff's chances of recovery was not one of the factors identified by the Court in its seminal decision of *Gulf Oil Corporation* v. *Gilbert*, *supra*, wherein the Court first outlined the public and private interest factors to be considered in resolving a *forum non conveniens* motion in a diversity action, or in any of the other decisions by the Court relating to *forum non conveniens*. In *Gulf Oil Corporation* v. *Gilbert*, *supra*, the Court was afforded the opportunity to identify the benefits to the plaintiff's chances of recovery in the present forum as a relevant factor, as the plaintiff there admitted that he had selected the original forum because he thought he would receive a more liberal jury verdict there, *id.* at 510, but the Court did not view this as precluding dismissal and affirmed the *forum non conveniens* dismissal. More significantly, by relying solely on the applicable substantive law to deny a *forum non conveniens* dismissal, the Third Circuit has drastically revised the governing *forum non conveniens* standard to one which ignores the public and private interests enunciated by the Court in *Gulf Oil Corporation* v. *Gilbert*, *supra*, reducing the *forum non conveniens* standard to one factor, the law which will govern the suit. This is a very different standard from that recognized by this Court.[7]

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[7] The decision of the Court below is inconsistent with the decisions of other Circuit Courts in a related respect, *i.e.*, by discounting the significance of the absence of third party defendants who are beyond the jurisdiction of American courts, but subject to process in the foreign national's home jurisdiction, and the pendency

2. The decision of the Court below raises important and recurrent questions relative to the exercise of jurisdiction by the federal courts. The case raises important questions as to the propriety of federal court enforcement of a parochial, ethnocentric view that the supposed benefits of American law must be afforded to and imposed on the world community, to the encouragement, even reward, of wholesale forum shopping by foreign plaintiffs with the consequent burden on United States courts and domiciliaries from the increase in litigation which belongs, and is even pending, in other courts. Serious concerns are also posed relative to the assessment of liability against American citizens in favor of foreign domiciliaries in excess of the recovery their own home jurisdiction would provide to the detriment of American manufacturers. Indeed, the future, if any, of the *forum non conveniens* doctrine is in question as a result of the decision below.

The fundamental, and only, mechanism for controlling the exercise of federal jurisdiction over foreign cases is the *forum non conveniens* doctrine. The decision

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of another action by the foreign decedents' heirs and next of kin in the foreign forum against these absent third parties. The Court below noted that these considerations were factors in the *forum non conveniens* balance, but gave them virtually no weight, in part due to the Court's erroneous understanding of *res judicata* principles. (App. A *infra* pp 19a-20a). In contrast to this summary disregard of the significance of the prejudice and burden of the inability to implead third parties and of duplicative law suits, the First, Second, Eighth, and Ninth Circuits have given those factors substantial weight, as did the District Court in this suit. *E.g.*, *J. F. Pritchard & Co.* v. *Dow Chemical of Canada, Limited*, 462 F.2d 998 (8th Cir. 1972); *Fitzgerald* v. *Texaco, Inc.*, *supra*; *Fitzgerald* v. *Westland Marine Corp.*, 369 F.2d 499 (2nd Cir. 1966); *Olympic Corp.* v. *Societe Generale*, *supra*; *Codex Corp.* v. *Milgo Electronic Corp.*, 553 F.2d 735 (1st Cir. 1977); *The Kanto Maru*, 112 F.2d 564 (9th Cir. 1940).

below emasculates the *forum non conveniens* doctrine, replacing the long-recognized public and private interest factors of *Gulf Oil Corporation* v. *Gilbert*, *supra*, with one consideration, the effect on the plaintiff's chances of recovery if the suit is dismissed. If, as the Third Circuit held, the suit cannot be dismissed if dismissal would impair the plaintiff's chances of recovery, then the convenience of and prejudice to the defendants and third parties and the interests of the local courts and communities, the *raison d'être* of the *forum non conveniens* doctrine, *Swift & Co. Packers* v. *Compania Colombiana Del Caribe*, *supra*; *Gulf Oil Corporation* v. *Gilbert*, *supra*, are of secondary, if any, significance. As a result, the very policies and concerns this Court sought to implement by its recognition of the *forum non conveniens* doctrine in federal diversity actions will no longer be secured by this doctrine, policies and concerns which are still quite viable in the 1980's.

As a result of the Third Circuit's elevation of the applicable law to a dispositive role in *forum non conveniens* motions, it has become generally recognized that the outcome of a case will now turn on the applicable choice of law rules. This is not the intended, or even imagined, result of the various state's choice of law rules, and these principles should not be forced into service for a purpose they were not designed to fulfill. Perhaps more significantly, this was not the basis for the application of the *forum non conveniens* doctrine intended by this Court. The decision of the Court below must be reviewed and reversed to return the *forum non conveniens* doctrine to its original foundations and the litigation of foreign accident cases to the appropriate forum.

Because the choice of law rules of the original forum state will have such a substantial impact on the

outcome of any *forum non conveniens* motions filed in the case, the plaintiff's counsel can pre-determine the resolution of such a motion by careful forum selection. An astute plaintiff's attorney can select an original forum with choice of law rules which will lead to the applicability of American law to the plaintiff's claims on the facts of the particular case, thereby guaranteeing the outcome of any *forum non conveniens* motion in the case. Federal jurisdiction should turn on more weighty considerations than the plaintiff's forum shopping skills. Indeed, if the Third Circuit's decision is allowed to stand, *forum non conveniens* will virtually be eliminated by careful selection of the initial forum.

This dispositive effect the Third Circuit's rule gives to choice of law rules will also result in inconsistent dispositions of *forum non conveniens* motions in cases involving substantially the same or similar facts, due to differences in the applicable choice of law rules. The various American jurisdictions recognize several very different choice of law rules, such as *lex loci*, "governmental interests" and "significant contacts." If the substantive law applicable to the case is dispositive of the merits of a *forum non conveniens* dismissal, actions involving substantially similar facts will have different results in terms of *forum non conveniens*, solely because differences in the forum's conflict of law rules will lead to the application of different substantive law. An apt example of this dilemma are the opposite conclusions reached on similar facts as a result of the application of different choice of law rules in the instant action and *Dahl* v. *United Technologies*, No. 79-2596/97/98/99 (August 7, 1980), wherein a *forum non conveniens* dismissal was affirmed, decided within weeks of each other by the Third Circuit. The *forum non conveniens*

doctrine should be applied with an even hand across the board, without regard to the state or circuit in which the action is initially brought.

The decision of the Court below also raises important questions as to whether it is, or should be, the role of our federal courts to guarantee foreign plaintiffs rights and monetary recoveries the laws and courts of their own jurisdiction saw fit to withhold. It is somewhat presumptuous of the American system of justice to state that foreign nationals can only be adequately protected by our courts and our legal system and that Scotland or other countries cannot be trusted to do justice to their own citizens. The presumption of the Third Circuit that federal courts must retain jurisdiction over claims by foreign nationals to ensure that they receive the benefits of our laws is the type of parochial outlook criticized by the Court in *M/S Bremen* v. *Zapata Off-Shore Company*, *supra* at 15-16. The Third Circuit itself has aptly characterized such a claim in *DeMateos* v. *Texaco, Inc.*, *supra*, as 'a variety of social jingoism, which presumes that the "liberal purposes" of American law must be exported to wherever our multinational corporations are permitted to do business.' *Id.* at 902.

The necessary corollary to the Third Circuit's rule and its assumption that foreign plaintiffs must be treated the same as American plaintiffs and cannot be deprived of the benefits of our laws is that our federal courts must become "international courts" for the adjudication of any controversy involving an American product anywhere in the world. Neither the federal courts nor the local communities are equipped to handle such a task, and have no real interest in so doing. Not only do the federal courts not have any interest in assuming such a role, but also there is no need for such activism. Virtual-

ly all foreign countries have a judicial system which would afford these foreign claimants a hearing and recognize compensatory rules of law for injured parties. In the instant action, both Piper and Hartzell had established that Scotland recognized and applied negligence principles and various measures of damages. If the alternate, foreign country did not provide a forum for the plaintiff's claim, one of the prerequisites to a *forum non conveniens* dismissal, an alternate forum in which the suit should have been brought, *Gulf Oil Corporation* v. *Gilbert*, *supra*, would be absent. Thus the federal courts are not needed to fulfill an international judicial function, and where there is a need for a forum, the *forum non conveniens* doctrine already provides for the necessary limitations on dismissal through a different requirement.

CONCLUSION

The Petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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EXHIBITS

EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2747

GAYNELL REYNO, as Personal Representative of the Estate of William Fehily, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott,
Appellant

v.

PIPER AIRCRAFT COMPANY, a corporation; AVCO LYCOMING ENGINE GROUP, a Division of AVCO CORPORATION; HARTZELL PROPELLER, INC., a corporation

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
C. A. No. 77-1159

Argued May 22, 1980
Before: ADAMS, VAN DUSEN and HIGGINBOTHAM,
Circuit Judges

(Filed July 24, 1980)

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OPINION OF THE COURT

ADAMS, *Circuit Judge*

This is an appeal from a dismissal of a wrongful death action on grounds of forum non conveniens. The issues include the factors to be considered in such a dismissal, the burden of persuasion on the motion, the scope of the trial judge's discretion, and the application of choice of law rules of California and Pennsylvania.

The event giving rise to this dispute was the crash of a Piper aircraft in Scotland in July 1976. The plane was owned by a Scottish air taxi service, the passengers and crew of which were Scottish. All persons aboard were killed and no witnesses survived the crash. There are indications, however, that something went wrong with the left engine for which compensatory action by the pilot was impossible, was unnecessarily difficult, or was ineptly handled by the pilot.[1]

Gaynell Reyno, a California resident and personal representative of the estates of various Scottish dece-

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1. Determination of these issues by the ultimate factfinder, of course, will be dealt with when the merits of the case are reached.

dents, sued on their behalf in a California state court. Named as defendants were Piper Aircraft Corp., a Pennsylvania corporation that manufactured the aircraft; Avco Lycoming Engine Group, which produced the engine; and Hartzell Propeller, Inc., an Ohio corporation that built the propeller. The wrongful death action is based on theories of strict liability and negligence.[2]

On motions by Piper and Avco based on diversity of citizenship, the case was removed from the California state court to the federal district court in California. After the removal, Hartzell moved to dismiss for lack of personal jurisdiction or, in the alternative, to transfer the case to the Middle District of Pennsylvania under 28 U.S.C. §1404(a).[3] Piper moved to dismiss for failure to state a cause of action or, alternatively, to transfer the case to the Middle District of Pennsylvania and to strike the claim for punitive damages. The action was dismissed as to Avco with the agreement of plaintiff.

The district court in California entered an order (1) granting the motion to quash service of process as to Hartzell on the ground that personal jurisdiction over Hartzell was neither authorized by California law nor in accord with due process; and (2) transferring the case to

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2. Plaintiff contends that the engine malfunction itself was the result of a design or manufacturing defect for which Piper is liable. In addition, the following dangerous and defective conditions in the aircraft are alleged: (1) inadequacies associated with the left propeller mechanism that prevented institution of emergency procedures in the event of engine loss; (2) design and manufacture of an aircraft incapable of single engine flight with a "windmilling" propeller; (3) manufacture of an aircraft with improper instruments for maintaining single engine operation; and (4) inaccuracies and omissions in the Aircraft Owners Handbook and flight manuals pertaining to emergency procedures and single engine operating speeds.

3. That section provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

the Middle District of Pennsylvania pursuant to §1404(a).

Subsequent to the transfer, Hartzell was validly served with process in Pennsylvania and then moved to dismiss the case on the common law ground of forum non conveniens. Piper filed a similar motion captioned as a request for judgment on the pleadings or summary judgment. Both motions were accompanied by affidavits. On the basis of the affidavits, the trial judge granted the motions to dismiss because of forum non conveniens on condition that defendants submit to personal jurisdiction in Scotland and waive any statute of limitations there. Reyno filed a timely appeal.

In this Court, Reyno raises two major contentions: (1) The judge erred in not holding defendants equitably estopped to assert that Scotland was a more appropriate forum, inasmuch as Piper had maintained in California that Pennsylvania was the most appropriate forum. (2) The trial judge abused his discretion in dismissing the action. Subsidiary, but arguably crucial, to this second point is the claim that the district judge's order was based on a legal error as to whether Scottish or Pennsylvania law applied to most or all of the case.

I. THE INTERACTION OF A TRANSFER UNDER §1404(a), A SUBSEQUENT FORUM NON CONVENIENS MOTION, AND THE CONCEPT OF PRECLUSION

Reyno argues that the district court erred in not considering whether the defendants were equitably estopped from moving to dismiss. Essentially, she contends that, by following a successful motion to transfer the case from California to Pennsylvania with a motion to dismiss so that the case would have to be filed in Scotland, the defendants are trifling with the court and wasting judicial and litigant time and resources.

The district court's opinion did, however, consider plaintiff's argument and rejected it, albeit in a somewhat summary fashion:

> No cases are cited in support of that proposition and we believe that is a sufficient indicator of the merit of that argument. . . . The papers filed concerning the motion to transfer are, of course, irrelevant to the question we have decided. They were filed early on in this proceeding before many of the important facts of this case were uncovered. Also, Defendants should not be punished for their failure to file a motion to dismiss for forum non conveniens first, instead of the motion to transfer. If they would have filed such a motion we feel sure that the California district court would have likewise dismissed this action.[4]

The Court of Appeals for the Fifth Circuit has reversed the dismissal of an admiralty claim on forum non conveniens grounds for the reasons now pressed by Reyno. It declared that the defendant should not be permitted, after securing a statutory transfer from Louisiana to Georgia, to contend that Georgia was not really an appropriate forum; the defendant "may not 'so trifle with the judicial process.' "[5]

Defendants here urge, and the district court seemed to accept, that they did not take inconsistent positions before the district court in California and that in Pennsylvania. The motion in California, defendants argue, simply represented that Pennsylvania was a better forum than California, whereas the present motion contends that Scotland is better yet. Furthermore, they aver,

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4. 479 F. Supp. at 738.

5. Insurance Co. of North America v. Ozean/Stinnes-Linien, 367 F.2d 224, 227 (5th Cir. 1966) (quoting Livesay Ind. v. Livesay Window Co., 202 F.2d 378, 382 (5th Cir.), *cert denied*, 346 U.S. 855 (1953)).

any inconsistencies are a result of fuller knowledge of the relevant facts.

Examination of the motions made by defendants in California reveals that their prior allegations are indeed at variance with their present contentions. A statutory transfer, as well as a common law dismissal, must be shown to be not only more convenient, but also in the interest of justice. In meeting that burden, Hartzell asserted in California that "the plaintiffs would easily have their interests herein protected and adjudicated by application to the courts located in the State of Pennsylvania, and in fact such would be overwhelmingly fair to all the parties herein."[6] Similarly, Piper argued that "[t]he propriety of transferring the within action to Pennsylvania for the convenience of the witnesses appears to overwhelm other factors, in view of the apparent theories of liability as against the defendants."[7]

Both defendants averred that, because the claim was based on strict liability, virtually all the evidence and material witnesses as to production and design would be in Pennsylvania or Ohio.[8] Furthermore, they argue that

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6. Hartzell's Memorandum of Points and Authorities in Support of Motion to Dismiss for Lack of Jurisdiction over the Person or for Transfer under 28 U.S.C. §1404(a) at 8. No. CV-77-3181-IH (C.D. Cal., filed Oct. 11, 1977).

7. Piper's Memorandum of Points and Authorities in Support of Motion to Transfer under 28 U.S.C. §1404(a) at 6. No. CV-77-3181-IH (C.D. Cal., filed Nov. 23, 1977).

8. Hartzell stated in its memorandum that "the records and employees of the . . . defendants herein are prospective evidence and witnesses, respectively." Piper asserted, "Necessarily, it would seem that all material witnesses on the liability issues reside in either Pennsylvania or Ohio." In reply to plaintiff's opposition to the transfer, Piper argued that the respective employees of Piper . . . and Hartzell Propeller, who were involved in the design, manufacture, testing, and assembly of the component parts in question, will be material witnesses, but they are located in Pennsylvania and Ohio. It is clear that the convenience of these witnesses is better served if the within action is pending in the State of Pennsylvania than if it is pending in the Central District of California."

new facts bearing on forum non conveniens were discovered after motions were filed in California.

At the time of the transfer motion all facts now alleged to be relevant — *e.g.*, where various witness are, where the crash occurred, where the wreckage was located, and who owned the plane — were known. All that seems new was that a British administrative agency would investigate and report on the accident and that the decedents' estates would institute a separate action against the air taxi service in Scotland. Although these last facts are indeed relevant to a forum non conveniens motion, they are hardly surprising or significantly new. What defendants really are arguing is that the case was not thoroughly researched before making the transfer motion.

Nevertheless, two factors weigh against an absolute preclusion to raise a forum non conveniens motion in this case: (1) The thrust of Hartzell's motion in the California court, and the contention accepted by that tribunal, was lack of personal jurisdiction. Arguably, then, it is not fair to make Hartzell responsible for proceedings there, even if it would be fair and proper as against Piper. (2) Forum non conveniens entails important considerations of public interest, in addition to those of the private litigants themselves. If defendants are correct in their assertion that trial in Pennsylvania would be unduly burdensome to the court and the juror community, it might be self-defeating to raise an absolute barrier to pleading forum non conveniens. Hence, although a party who moves for transfer under §1404(a) will not be automatically estopped to assert forum non conveniens after a transfer is accomplished, the fact that a party previously succeeded in a statutory transfer ought to be weighed against dismissing for forum non conveniens and as adding to a defendant's already substantial burden on the later motion.

II. FORUM NON CONVENIENS DISMISSAL

The doctrine that an otherwise validly brought claim may be dismissed because the forum chosen was inconvenient for trial had its origin in the common law of Scotland,[9] became part of the common law of many states,[10] and has a long history of use in federal admiralty actions.[11] It was introduced into federal diversity jurisdiction by *Gulf Oil Corp. v. Gilbert*[12] and *Koster v. (American) Lumbermens Mutual Casualty Co.*,[13] decided in 1974.

Simple in enunciation but complex in application, the principle of the doctrine is "that a court may resist imposition upon its jurisdiction even when" neither jurisdiction nor venue is defective.[14] Forum non conveniens as a common law doctrine has been dormant for purposes of interstate dismissals within the federal system since the passage of 28 U.S.C. §1404(a) soon after the two seminal Supreme Court cases.[15] That statute is similar to the common law doctrine, but authorizes transfers within the federal court system with a lesser

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9. Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 909-11 (1947). The issue of inconvenient forum as a question on the merits rather than of jurisdiction may be traced at least to 1845. See *id.* at 909 (citing M'Morine v. Cowie, 7 Dunl. 270 (1845)).

10. *See* Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Colum. L. Rev. 1 (1929); Braucher, *supra* note 9, at 911-12.

11. The doctrine in admiralty is thought to derive from dictum in Mason v. The Ship Blaireau, 6 U.S. 143, 157, 2 Cranch 240, 264 (1804). *See* Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L. Rev. 12, 12 & n.10 (1949); Braucher, *supra* note 9, at 920 & n.79. *But cf.* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 505 n.4 ("The doctrine did not originate in federal but in state courts.").

12. 330 U.S. 501 (1947).

13. 330 U.S. 518 (1947).

14. Gulf Oil Corp. v. Gilbert, 330 U.S. at 507.

15. 62 Stat. 937 (1948) (codified at 28 U.S.C. §1404).

burden — both substantively and procedurally — than a motion to dismiss.[16]

The question whether federal or state law of forum non conveniens applies in a diversity case was left open by the Supreme Court and has not definitively been decided by any court of appeals.[17] In this case, as in many

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16. The statute is a revision rather than just a codification of forum non conveniens. It permits federal courts to grant transfers on a lesser showing of inconvenience than is required under the common law doctrine and there is no need for pleadings or documents to be refiled in the transferee court. The relevant factors to be considered, however, are the same. Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955).

17. The Erie question was a matter in controversy in both *Gilbert* and *Koster* until the cases reached the Supreme Court. In *Gilbert* the district court, relying on Weiss v. Routh, 149 F.2d 193 (2d Cir. 1945), held New York law to apply and dismissed the action. 62 F. Supp. 291, 294 (S.D.N.Y. 1945). The Court of Appeals distinguished *Weiss*, held that federal law controlled, and reversed the trial judge for abuse of discretion. 153 F.2d 883, 886 (2d Cir. 1946). A separate panel deciding *Koster* also applied federal law, but cautiously noted that the result would have been the same under state law. 153 F.2d 888, 890 n.2 (2d Cir. 1946). In considering the merits of the dismissal, the Supreme Court relied exclusively on Supreme Court cases, but then avoided discussion of the *Erie* problem with the following:

> The law of New York as to the discretion of a court to apply the doctrine of *forum non conveniens*, and as to the standards that guide discretion is, so far as here involved, the same as the federal rule. . . . It would not be profitable, therefore, to pursue inquiry as to the source from which our rule must flow.

330 U.S. at 509 (citations to New York cases omitted). In *Koster* the Court was equally inscrutable. *See* 330 U.S. at 529 ("Since this case is pending in New York and is a diversity case, it is appropriate to observe that the law of New York, if applicable, is to the same effect as to the considerations to govern forum non conveniens questions in this class of cases.")

The Court's decision not to decide was sharply criticized by Professor Braucher who observed that it

> seems to have been arrived at by something like main force: in the *Koster* case it was contrary to the unanimous view of the

brought before the federal courts, federal law has been argued at all stages in the litigation.[18] Upon specific request for supplementary briefing in this Court, all three parties agree that if a choice is necessary, federal law should be followed, and cite numerous district court opinions and commentaries in support of that position.[19]

NOTE 17 — *(Continued)*

> circuit judges [that federal law applied], and in the *Gilbert* case it was reached only by ignoring the state court decision most nearly in point, which had been cited with approval by the New York Court of Appeals. Since the circuit court of appeals had not regarded the New York law as controlling, previous decisions suggest that if New York law were held to govern, the normal practice of the Supreme Court would be to remit the case to the lower court to determine that law.[123]
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> 123. Wertheim v. Clergue, 53 App. Div. 122, 65 N.Y. Supp. 750 (1st Dep't 1900); *see* Gregonis v. Philadelphia & R. C.& I. Co., 235 N.Y. 152, 139 N.E. 223, 225 (1923). The *Wertheim* case reversed dismissal of an action based upon false representations in the inducement and performance of a contract on the ground there was no discretion in "cases arising out of commercial transactions and affecting property." 53 App. Div. at 126, 65 N.Y. Supp. at 753. The Supreme Court relied on New York cases containing general statements that there is discretion to dismiss tort actions.

Braucher, *supra* note 9, at 928 (footnotes 122 and 124 omitted). Since the *Gilbert* and *Koster* cases, the Second Circuit has altered its position to indicate that the Erie question is an open one. *See* Thomson v. Palmieri, 355 F.2d 64, 66-67 (2d Cir. 1966).

18. *See* Founding Church of Scientology v. Verlag, 536 F.2d 429, 434 n.13 (D.C. Cir. 1976) ("Although the issue has never been squarely addressed by this Court, federal courts in the District [of Columbia] have in practice used the federal law of *forum non conveniens*.")

19. A footnote in *Koster* addressing the question whether federal courts have discretion to decline granted jurisdiction strongly points, along with the structure of the Court's reasoning in both *Gilbert* and *Koster*, toward use of federal rather than state law:

> Some of our cases appear to hold broadly that the federal courts must exercise their jurisdiction, when they have it. [citing cases]. But this is not a case in which it is urged that a state

They assert, nevertheless, that it is probably not necessary to decide between federal and state law because the cases dealing with forum non conveniens in both California and Pennsylvania have mirrored federal law in all essential respects. We agree.[20]

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statute restricting remedy to state proceedings defeats federal diversity jurisdiction, as [those cases] were . . . . In those cases, the Court held that when a state recognizes a cause of action, suit may be brought on it in federal court if diversity jurisdiction is established. That holding has nothing to do with this case. *We are concerned here with the autonomous administration of the federal courts in the discharge of their own judicial duties, subject of course to the control of Congress.*

330 U.S. at 520 n.1 (emphasis added). Moreover, in Parsons v. Chesapeake & O.R. Co., 375 U.S. 71, 73 (1963), which was not a diversity case, the Court held that "a prior state court dismissal on the ground of forum non conveniens can never serve to divest a federal district judge of the discretionary power [to transfer a case under §1404(a)]." Virtually all the district courts and commentators that have squarely faced the issue have decided to apply federal law. *See, e.g.*, Poe v. Marquett Cement Manuf. Co., 376 F. Supp. 1054, 1057-59 (D. Md. 1974); Lapides v. Doner, 248 F. Supp. 883, 885-94 (E.D. Mich. 1965); Shulman v. Compagnie Generale Transatlantique, 152 F. Supp. 833, 834-36 (S.D.N.Y. 1957); 1A (pt. 2) Moore's Federal Practice ¶0.317[2], at 3232-33 (2d ed. 1978); 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §3828, at 181 & n.19 (1976).

20. Opinions of the Pennsylvania Supreme Court have adopted almost verbatim the factors to be considered that are set out in *Gilbert's* and *Koster*, scope of trial court discretion, and standard of appellate review. *See* Rini v. N. Y. Central R. Co., 429 Pa. 235, 240 A.2d 372 (1968); Plum v. Tampax, Inc., 399 Pa. 553, 160 A.2d 549 (1960). The section of the Restatement regarding forum non conveniens, on which the Pennsylvania courts also rely, in turn relies on the major federal cases. *See* Restatement (2d) Conflict of Laws §84 note (1971). California's forum non conveniens doctrine, formerly of common law origin, is now statutorily codified at Cal. Civ. Proc. Code §410.30. Archibald v. Cinerama Hotels, 15 Cal. 3d 853, 858, 544 P.2d 947, 950, 126 Cal. Rptr. 811, 814 (1976). California law precludes, except in extra ordinary cases, a trial court

A. *Comparative Burdens, Trial Court Discretion, and Standard of Review*

A plaintiff is generally conceded the choice of forum as long as the requirements of personal and subject matter jurisdiction, as well as venue, are satisfied. He should not be deprived of the advantages presumed to come from that choice unless the defendant clearly shows facts that "either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience . . . or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems."[21] A court must balance these private and public interest factors, "[b]ut unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[22]

The district judge believed that the plaintiff's choice of forum is of diminished significance, and the defendants' burden of showing inconvenience correspondingly

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NOTE 20 — *(Continued)*
from dismissing on forum non coveniens grounds an action brought, as in this case, by a California resident. *Id.* at 859, 126, 544 P.2d at 950, Cal. Rptr. at 814. An exception to this limitation is made where, also as here, a California resident sues in a representative capacity for foreign beneficiaries. *See id.* at 860 & n.6, 544 P.2d at 951 & n.6, 126 Cal. Rptr. at 815 & n.6. In all respects relevant to this case, then, we find no dissimilarities in the factors considered under federal and California law. *Cf.* Jagger v. Superior Court, 96 Cal. App. 3d 579, 585-87, 158 Cal. Rptr. 163, 166 (1979) (outlining California law in manner essentially following *Gilbert* and *Koster*; concluding that satisfaction in divorce action between foreign celebrities should be deferred to English courts).

21. *Koster*, 330 U.S. at 524.

22. *Gilbert*, 330 U.S. at 508; *see* Schertenleib v. Fraum, 589 F.2d 1156, 1164 (2d Cir. 1978) ("We begin by noting that plaintiff chose this forum and defendant resides here. This weighs heavily against dismissal."); Hoffman v. Goberman, 420 F.2d 423, 426-27 (3d Cir. 1970).

less, when the plaintiff — more precisely, the real parties in interest — is foreign or when the forum chosen is not the plaintiff's home ground.[23] Neither of these burden-shifting principles may be found in opinions of the Supreme Court or this Court.

In support of the proposition that less solicitude is due a foreign plaintiff's choice of forum, the district court relied on a decision of the District Court for the Southern District of New York which stated that a foreign plaintiff's "choice of forum should be given less weight than the choice of an American plaintiff."[24] The court of appeals affirmed the judgment in that case, but disapproved of the district court's characterization of the forum non conveniens doctrine applicable to noncitizens.[25] Indeed, as the Court of Appeals for the Second Circuit has recently held, the citizenship of the plaintiff does not affect the defendant's burden under *Gilbert* and *Koster*. American citizenship of the plaintiff does not increase the defendant's burden, just as foreign citizenship may not lessen it.[26]

The holding by the trial judge that a plaintiff's choice is entitled to less weight when it is not the plaintiff's state of residency is somewhat difficult to follow when, as here, that party has already been forced to cede

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23. 479 F. Supp. at 731.

24. Farmanfarmaian v. Gulf Oil Corp., 437 F. Supp. 910, 927 (S.D. N.Y. 1977), *aff'd on other grounds*, 588 F.2d 880 (2d Cir. 1978).

25. *See* Farmanfarmaian v. Gulf Oil Corp., 588 F.2d 880, 882 (2d Cir. 1978).

26. Alcoa Steamship Co., Inc. v. M/V Nordic Regent, No. 78-7054, slip op. at 5960-68, 5973 (2d Cir. Feb. 25, 1980) (en banc). The court of appeals en banc thus seems to have overturned without specific mention the panel holding in Olympic Corp. v. Societe Generale, 462 F.2d 376, 378 (2d Cir. 1972), that the defendant's burden is greater if an American plaintiff is to be relegated to a foreign forum. The *Olympic Corp.* opinion was also relied on by the district court here.

the "home court advantage" as a result of the defendants' previous motion to transfer the case from California to Pennsylvania.[27] It would be the rare situation in which a defendant could complain of being vexed or harassed by defending a lawsuit on his home ground.

Of course, the Supreme Court has stated that "[t]he doctrine [of forum non conveniens] leaves much to the discretion of the court to which plaintiff resorts," but this broad proposition was followed by the explanatory observation that "experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses."[28] The standard of review is one of abuse of discretion,[29] but if the trial court has not held the defendants to their proper burden or has clearly erred in weighing the factors to be considered, the equivalent of an abuse of discretion has been demonstrated. Discretion must be exercised within the applicable standards.[30] The district court's wide discretion may

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27. Phoenix Canada Oil Co., Ltd. v. Texaco, Inc., 78 F.R.D. 445, 453 (D. Del. 1978). The district court relied on Fitzgerald v. Texaco, Inc., 521 F.2d 448, 451 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976), which may have relied too literally on *Koster's* mention of deference to a plaintiff's choice of his home forum in setting forth the defendant's burden of establishing inconvenience. *See* 330 U.S. at 524. It is apparent that the *Koster* court was simply setting forth the proposition that, as between diverse citizens, convenience of a particular forum to one party will almost inevitably mean inconvenience to the other. Given this trade-off, the plaintiff's choice will generally be respected.

28. *Gilbert*, 330 U.S. at 508.

29. DeMateos v. Texaco, Inc., 562 F.2d 895, 897 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978).

30. *Cf.* Founding Church of Scientology v. Verlag, 536 F.2d 429, 436 (D.C. Cir. 1976) ("Where, as here, there has been no *weighing* of the relative advantages of each forum but only a consideration of the drawbacks of one, that discretion has been abused."). By way of analogy, it appears appropriate to note that on appeal from the grant of a preliminary injunction, "the standard of appellate review is simply whether the issuance of the injunction, *in the light of the applicable standard*, constituted an abuse of discretion." Doran

not serve the defendants as a burden-shifting device on appeal from an order in their favor.

B. *The Applicable Factors*

The *Gilbert* Court divided the elements to be considered into those affecting the private interests of the litigants and those in which the public has an interest. The former include

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained.[31]

Also relevant is the inability to implead other parties directly involved in the controversy.[32] These various ingredients are weighed to determine the "relative advantages and obstacles to fair trial."[33]

Among the public interest factors are problems of creating court congestion and imposing jury duty in litigation centers that are removed from the origin of the controversy, the benefit in a matter of public concern of holding the trial in a place accessible to the locality, and the appropriateness of having the trial in a forum that is

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v. Salem Inn, Inc., 422 U.S. 922, 931-32 (1975) (emphasis added). Thus, an order for a preliminary injunction may be reversed if the trial court "commits an obvious error in applying the law, or makes a serious mistake in considering the proof." A. O. Smith Corp. v. FTC, 530 F.2d 515, 525 (3d Cir. 1976); *see* Continental Group, Inc. v. Amoco Chemicals Corp., 614 F.2d 351, 357 (3d Cir. 1980).

31. 330 U.S. at 508.

32. *Id.* at 511; Fitzgerald v. Texaco, Inc., 521 F.2d 448, 453 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976).

33. *Id.* at 508.

familiar with the law governing the case rather than having a court elsewhere untangle foreign law.[34]

We will examine each of these factors to determine whether the defendants met their burden.

C. *Private Interests*

1. *Convenience of Witnesses*

If a dismissal is to be premised on the convenience of witnesses, more than a mere allegation to that effect is required. The rule for a statutory transfer, which is to be more readily granted, is no less applicable to a dismissal for forum non conveniens:

> The party seeking the transfer must clearly specify the key witnesses to be called and must make a general statement of what their testimony will cover. The emphasis must be on this showing rather than on numbers. One key witness may outweigh a great number of less important witnesses. If a party has merely made a general allegation that witnesses will be necessary, without identifying them and indicating what their testimony will be the application for transfer will be denied.[35]

The district court opinion does not discuss the need for such a showing, but rather merely refers generally to witnesses as to damages and witnesses as to the potential supervening negligence of the Scottish air taxi service, all of whom are in Scotland.[36] Nor do the defendants

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34. *Gilbert*, 330 U.S. at 508-09.

35. 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §3851, at 270-71 (1976); *see* Marbury-Patillo Construction Co., Inc. v. Bayside Warehouse Co., 490 F.2d 155, 158 (5th Cir. 1974); Texas Gulf Sulphur Co. v. Ritter, 371 F.2d 145, 148 (10th Cir. 1967). This rule has wide authority in the district courts as well. *See, e.g.*, Follansbee Metals Co., Inc. v. John T. Clark & Son of N. H., Inc., 387 F. Supp. 574, 581 (W.D. Pa. 1974); Clay v. Overseas Carrier Corp., 61 F.R.D. 325, 331 (E.D. Pa. 1973); Shulof v. Westinghouse Elec. Corp., 402 F. Supp. 1262, 1264 (S.D.N.Y. 1975).

36. 479 F. Supp. at 732.

direct us to any affidavits setting forth the requisite specific information, and our search of the record detects none. The requirement of specificity would seem more acute in this case in view of the fact, mentioned above, that in motions before the district court in California the defendants made the claim, in some sense inconsistent with the position now taken though perhaps more accurate, that all witnesses relevant to strict liability or negligence in manufacturing are in Pennsylvania or Ohio.[37]

At the least, then, the district court did not have sufficient information to weigh the convenience of witnesses, and its conclusion that this factor favored defendants appears to be without the requisite foundation.

One further error in discerning the balance of inconvenience to witnesses deserves mention. The trial judge stated that the convenience of expert witnesses, like that of counsel, "is of small importance."[38] No explanation was given for this assertion,[39] but the theory seems to be either that expert witnesses are fungible or that their testimony can be introduced effectively by deposition. We agree with the authors of a noted treatise that this view is unsound.[40] In this case, as in many others, the testimony of expert witnesses will be crucial. Finding the most trustworthy and credible experts is not

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37. *See* pp. 5-6 & note 8 *supra*.

38. 479 F. Supp. at 732.

39. The district court cited Car-Freshner Corp. v. Auto Aid Mfg. Corp., 438 F. Supp. 82, 85 (N.D.N.Y. 1977), which simply cites other cases without explaining. The proposition seems to be traceable to Nacona Leather Goods Co. v. A. G. Spaudling & Bros., Inc., 159 F. Supp. 269, 270-71 (D. Del. 1958). the judge in that case simply concluded that the inconvenience to plaintiff's expert in one forum was counter-balanced by the inconvenience to defendant's expert of trial in the other forum. It was not that the two were insignificant, but that they cancelled each other out.

40. *See* 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §3852, at 275 (1976).

often easy, and the advantages of live testimony are not to be discounted.[41]

B. *Availability of Compulsory Process and Impleader*

The defendants' major factual contention when the case comes to trial will be that the fatal crash at issue was caused not by any manufacturing or design defects, but by pilot error or the negligence of the foreign air taxi service. Inability to implead foreign third-party defendants was argued vigorously here as a problem with a trial in this country, and it has, of course, generally been considered an important consideration favoring a forum non conveniens dismissal.[42] Because there is an action pending in Scotland by the decedents' estates against the appropriate Scottish defendants, which lawsuit Piper and Hartzell have consented to join as codefendants, defendants argued, and the district court concluded, that it would be unfair and unduly burdensome for them to be subjected to both trials. Although the extra burden is readily apparent, the unfairness is not. The defendants state their point as follows:

> Defendants' inability to join [the Scottish] parties as defendants in this case would seriously prejudice Defendants, through exposure to unnecessary, duplicitous litigation, and inconsistent verdicts. If Defendants are found liable here, they will be forced to file an indemnity or contribution action in Scot-

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41. *Id.*; *see* Lykes Bros. S.S. Co. v. Sugarman, 272 F.2d 679, 681 (2d Cir. 1959); Berkshire Int'l Corp. v. Alba-Waldensian, Inc., 352 F. Supp. 831, 834-35 (S.D.N.Y. 1972) (Weinfeld, J.); Medich v. American Oil Co., 177 F. Supp. 682 (E.D. Pa. 1959) (Biggs, J., sitting by designation).

42. *See Gilbert*, 330 U.S. at 511; Fitzgerald v. Texaco, Inc., 521 F.2d 448, 453 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976).

land against these parties. In light of the fact that Pennsylvania and Scottish law differ greatly with respect to products liability, Piper faces the substantial possibility, and great prejudice, of being held liable on a products liability theory in this case but being forced to prove negligence in an indemnity or contribution action in Scotland. Even if the same standard of liability is applied in this action and in an indemnity or contribution action in Scotland, Defendants run the substantial risk that different juries will find different facts and, hence, produce inconsistent results.[43]

If the defendants are found liable on strict liability here but must prove negligence against the air carrier to obtain indemnity, that is not unfair, but simply the result reached under the laws of the jurisdictions in which the two companies reside. The air taxi operates exclusively in Scotland and plans its operations and expenses according to Scottish law. Piper and Hartzell reside in strict liability jurisdictions, conduct most of their business in strict liability states, and plan accordingly.

The defendants' risk of inconsistent verdicts would only exist if neither Pennsylvania nor Scotland followed principles of res judicata. Under those principles, any subsequent verdict for plaintiffs would merge with a previous favorable judgment or be barred by a prior judgment against the plaintiffs.[44] Res judicata is clearly ap-

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43. Brief of Appellee Piper at 22. Hartzell's argument on this point is simply conclusory:

> As is reinforced by the plaintiffs survivors action against the air carrier employing the pilot, the agency owning and maintaining the airplane and the estate of the pilot in Scotland, those parties should be joined as defendants and cannot be joined in the United States but could be joined in the proper Forum.

Brief of Appellee Hartzell at 13.

44. *See generally* Restatement (2d) Judgments §§47, 48, 68.1 (Tent. Draft No. 1, March 28, 1973).

plicable in American jurisdictions and we may assume, in the absence of any affidavits or citations of Scottish law to the contrary, that it is followed in Scotland as well.[45]

We therefore conclude that defendants' inability to implead other potentially liable parties would indeed make litigation here more burdensome, but defendants have not shown that it would also be unfair. It is properly a factor in their favor on the motion to dismiss, but it is not as weighty as they contend.

2. *Desirability of Viewing the Premises*

The district court concluded that, to the extent weight was to be assigned this factor, it favored defendants: "Familiarity with the topography around Tulla, Scotland and inspection of the wreckage of the plane would be aided by a trial in the British Isles."[46]

It is unclear whether the trial judge in fact ascribed any significant weight to this element, and still more uncertain is what benefit a lay jury would obtain from observing the wreckage in deciding whether the plane crashed because the engine or propeller were incorrectly manufactured or the pilot was negligent. Furthermore, the topography of Scotland may, to the extent relevant, be readily proved by testimony.

D. *The Public Interest*

The parties in arguing this case, and the trial judge in deciding it, have placed the greatest importance on whether, under the applicable choice of law rules, American or Scottish law would apply to major aspects of the claims. The district court concluded that, for the most part, Pennsylvania law should apply to Piper and

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45. Defendants submitted affidavits from Scottish counsel only on the following points of Scottish law: (1) choice of law, (2) damages that may be awarded, (3) statutes of limitations, and (4) capacity to sue.

46. 479 F. Supp. at 734.

Scottish law to Hartzell.[47] Because application of different laws to the different defendants might confuse the jury, and because ascertainment of Scottish law would make the trial more difficult, the necessity of applying foreign law to a portion of the case was considered the "uppermost" factor favoring dismissal.[48]

As will be discussed below, we conclude that the district court erred in its choice of law determinations. But even if the district court were correct in its conclusion that a mixture of Scottish and American law would be required, dismissal would not have been justified under this Court's settled principles of forum non conveniens.

1. *The Necessity of Applying Foreign Law*

First, we held in *Hoffman v. Goberman* that "[i]t is settled that the mere fact that the court is called upon to determine and apply foreign law does not present a legal problem of the sort which would justify the dismissal of a case otherwise properly before the court. The district court was, therefore, in error in basing its action, in part at least, on this ground."[49] Although there may be cir-

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47. The trial court opinion stated:

> Uppermost in our weighing of these public interest factors is that a trial in this forum would be hopelessly complex and confusing for a jury as different laws will apply to different parties. From our review of the applicable choice of law rules, it appears that Pennsylvania law would apply to Defendant Piper and that Scottish law would apply to Defendant Hartzell.

479 F. Supp. at 734.

48. *See id.*

49. 420 F.2d 423, 427 (3d Cir. 1970) (footnote omitted) (law of Netherlands Antilles involved); *accord* Mobil Tankers Co. v. Mene Grande Oil Co., 363 F.2d 611, 615 (3d Cir.) (Venezuelan law), *cert. denied*, 385 U.S. 945 (1966); Burt v. Isthmus Dev. Co., 218 F.2d 353, 357 (5th Cir.), *cert. denied*, 349 U.S. 922 (1955); *see* Founding Church of Scientology v. Verlag, 536 F.2d 429, 436 (D.C. Cir. 1976) (difficulty in applying German law not sufficient).

cumstances in which the application of foreign law would present difficulties sufficient to favor dismissal — because of difficulties of translation or because the foreign law itself has principles unknown to our jurisprudence — we are not faced with such a case here.[50] Negligence principles are well-known on this side of the Atlantic and of course there will be no translation problems in dealing with Scottish law.

Second, if trial here would confuse the jury because a different country's law would apply to each defendant, that confusion would either not be eliminated by a trial in Scotland or would be eliminated only by unacceptable unfairness to the plaintiff. If, as is unlikely, a Scottish court as a "transferee" court would apply the same choice of law rulings as would the court here, it would have an equally difficult problem in applying the laws of different countries to different defendants. Dismissal here would not eliminate the difficulty, but only shift it to a foreign forum.

The district court, though, had the affidavit of Scottish counsel that Scotland's choice of law rule for torts was to apply the law of the place of injury to all facets of the case, and therefore Scotland probably would apply its own law to all claims. Even under the district court's choice of law analysis, requiring a mixture of American and Scottish law, it is apparent that the dismissal would work a change in the applicable law so that the plaintiff's strict liability claim would be eliminated from the case. But this Court has held that a dismissal for forum non conveniens, like a statutory transfer, "should not, despite its convenience, result in a change in the applicable law."[51] Only when American law is not applicable, or

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50. 420 F.2d at 427.

51. De Matcos v. Texaco, Inc., 562 F.2d 895, 899 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978). The point is made by Professor Bickel in terms of fairness to the plaintiff. *See*, Bickel, *supra* note 11, at 28 & n.68 (because premise of forum non conveniens is

when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified.

2. *Choice of Law Rules Under* Klaxon and Barrack

As a federal court deciding a case premised on diversity jurisdiction, we are required by the *Klaxon* rule[52] to apply the conflicts of law rules of the state in which we sit. We are not permitted to fashion our own rules, however more clear or salutory they might seem.[53] Complicating matters here is that, for purposes of this litigation and its choice of law problems, we are in effect "sitting" in two different states. Moreover, though not entirely disinterested, each state is in the position of choosing between the laws of two other states.

The action against Piper was transferred under §1404(a) from California to Pennsylvania. The law of the transferor forum — *i.e.*, California's choice of law rules

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existence of jurisdiction, "a case will be retained whenever it is not perfectly clear that plaintiff can recover elsewhere if the facts he alleges are true").

52. Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487, 496 (1941).

53. The Supreme Court reaffirmed *Klaxon* in strong terms in Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3, 4 (1975) (per curiam) (reversing appellate court determination that, as a matter of federal choice of law, a federal court could not apply the choice of law rule of the state in which it sat if that jurisdiction had no policy interest in the case). Thus the Court has, at least for now, answered scholarly criticism of *Klaxon* and exhortations that it be overruled. *See, e.g.*, Baxter, *Choice of Law and the Federal System*, 16 Stan. L. Rev. 1, 32-42 (1963); Horowitz, *Toward a Federal Common Law of Choice of Law*, 14 U.C.L.A. L. Rev. 1191 (1967); *cf.* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 713-18 (2d ed. 1973) (making point by rhetorical questions).

— should therefore, under *Van Dusen v. Barrack*,[54] be applied as to Piper.

Hartzell's situation is more complex. The California district court ruled that personal jurisdiction over Hartzell was lacking, both under California law and the Due Process Clause. The court did not dismiss the case against Hartzell, but rather quashed service of process and ordered transfer to Pennsylvania along with codefendant Piper. Although this Court has held that transfer under §1404(a) is proper even though the transferor state lacked personal jurisdiction,[55] that does not resolve the problem whether the *Klaxon* and *Barrack*

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54. 376 U.S. 612 (1964). The *Barrack* rule — that a transfer should work no change in the applicable law — is a "general" one. the Court added this qualifier:

> [W]e do not and need not consider whether in all cases §1404(a) would require the application of the law of the transferor, as opposed to the transferee, State. We do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under §1404(a) or if it was contended that the transferor State would simply have dismissed the action on the ground of *forum non conveniens*
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> . . . .

Id. at 639-40 (footnote omitted). Piper does contend that a California court would have dismissed this action on the ground of forum non conveniens. This is implicit in its argument that we should now dismiss the case on that ground and that California law on this issue is the same as the federal law on which the issue has generally been argued. Both Piper and Reyno agree, however, that California's choice of law rules govern the case as to Piper. To follow the Court's caveat would, moreover, be inefficient and wasteful of judicial resources, for it would require the transferee court, after the transferor court had granted a 1404(a) transfer, to examine the transferor State's law to ascertain whether the defendant should have brought a motion to dismiss rather than to transfer in the first place. *See In re* Air Crash Disaster at Boston, Massachusetts on July 31, 1973, 399 F. Supp. 1106, 1121-22 (D. Mass. 1975).

55. In Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466 (1962), the Supreme Court held that transfer for improper venue under 28 U.S.C. §1406(a) was proper whether or not the court in which the

rules would still require us to apply the choice of laws rule of the transferor state.

To state the problem is, we believe, to explain why California's law may not apply to Hartzell: if California's exercise of jurisdiction would violate due process, so would application of that state's choice of law rules.[56] Furthermore, *Barrack* is not so rigid. The Court there stated as a *general* rule of statutory construction of §1404(a) that, to be "in the interest of justice," a transfer should not work a change in the applicable law.[57] We

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NOTE 55 — *(Continued)*
motion was filed had personal jurisdiction over the defendants. *Cf.* Martin v. Stokes, No. 78-3390, slip op. at 5-6 (6th Cir. filed June 19, 1980) ("following a transfer under §1406(a), the transferee district court should apply its own state law rather than the state law of the transferor district court") (citing cases). This Court applied *Goldlawr* by analogy to §1404(a) and held that if lack of both venue and personal jurisdiction could not defeat a transfer, then want of the latter alone could not. United States v. Berkowitz, 328 F.2d 358, 361 (3d Cir.), *cert. denied*, 379 U.S. 821 (1964).

56. *See* Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of law*, 62 Cornell L. Rev. 94, 103 (1976) (forum must have reasonable due process basis for applying own law, which does not exist if party opposing application of forum's law has no minimum contacts with forum, the transaction giving rise to the claim is not connected with the forum, or application of the forum's law would otherwise be manifestly unfair).

57. The plaintiff in the *Barrack* case challenged, by writ of mandamus, the district court's order transferring the case from Pennsylvania to Massachusetts. He contended that the transfer could not be, as §1404(a) requires, "in the interest of justice," because it was likely to be accompanied by a prejudicial change in the state law to be applied. 376 U.S. at 626. The district court had held that transfer could be ordered regardless of the possibility of a change in law, *id.* at 626-27, our Court agreed with the plaintiff that it could not, *see* Barrack v. Van Dusen, 309 F.2d 953 (3d Cir. 1963), and the Supreme Court, disagreeing with both the trial and appellate courts, reversed. A transfer would not be unfair, it held, because "[a] change of venue under §1404(a) generally should be, with respect to state law, but a change of courtrooms." 376 U.S. at 639.

conclude that this case comes within an exception, the possibility of which was noted in *Barrack*,[58] to the application of the transferor state's law. As with any other statute, we must construe §1404(a) to avoid any constitutional problem,[59] and so hold that when there has been an interstate transfer without personal jurisdiction, the transferor state's choice of law does not apply to that defendant. Because Pennsylvania does have personal jurisdiction, it is that state in which the federal court is located for the *Klaxon* purpose of finding the choice of law rules governing the case as to Hartzell.

Our analysis so far does not differ from that of the district court, which held that California's choice of law rules applied to Piper and Pennsylvania's rules applied to Hartzell.[60] The court went on to hold that under California's governmental interest approach the Scottish law of wrongful death would apply to make Reyno an improper litigant, but Pennsylvania's law of strict liability rather than Scotland's negligence law would govern the theory of the tort.[61] Pennsylvania's significant contacts approach was thought to require that Scottish law apply to all facets of the claim against Hartzell.[62] We must examine these rulings to determine whether they are erroneous as a matter of law.

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58. *See* note 54 *supra*.

59. *See, e.g.*, NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979).

60. 479 F. Supp. at 734.

61. The district court relied primarily on Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); and Hurtado v. Superior Court, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974), while mentioning in passing Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U.S. 859 (1976). 479 F. Supp. at 735-36.

62. *See* 479 F. Supp. at 736-37 (relying on Griffith v. United Airlines, 416 Pa. 1, 203 A.2d 796 (1964); and Lewis v. Chemetron, 448 F. Supp. 211 (W.D. Pa. 1978)).

a. *California Conflicts Law Applied to Piper*

California was a pioneering state in the governmental interest analysis approach to choice of law that was developed by Professor Currie.[63] In *Reich v. Purcell*,[64] the California Supreme Court abandoned the traditional view that the law of the place of wrong (injury) must be applied in tort actions regardless of the issues, and established in its stead the principle that "[t]he forum must search to find the proper law to apply based upon the interests of the litigants and the involved states."[65]

Also integral to the holding in *Reich v. Purcell* was the introduction into California law of the concept of "false conflicts."[66] In *Reich*, the wrongful death action arose from an automobile accident that occurred in Missouri between an Ohio plaintiff and a California defendant. Missouri, the state of injury, limited compensation for wrongful death, but neither California nor Ohio had any limitation. The California Supreme Court held that as to the issue of the extent of damages, as opposed to the standard of conduct on which liability was based, there was no true conflict in governmental interests. Since California had no limitation on damages, it had no

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63. Professor Brainerd Currie is generally considered to be the father of modern governmental interest analysis. *See* Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 722, 128 Cal. Rptr. 215, 218, *cert. denied*, 429 U.S. 859 (1976); Reese, *American Trends in Private International Law: Academic and Judicial Manipulation of Choice of Law Rules in Tort Cases*, 33 Vand. L. Rev. 717, 720 (1980); Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 Mich. L. Rev. 392, 392-93 (1980). Most of his writing on the subject is collected in B. Currie, Selected Essays on the Conflict of Laws (1963).

64. 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

65. 67 Cal. 2d 553, 432 P.2d at 729, 63 Cal. Rptr. at 33.

66. The term was not explicitly used in that case, but the methodology was. *See id.* at 555-56, 432 P.2d at 730-31, 63 Cal. Rptr. at 34-35. Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 722, 128 Cal. Rptr. 215, 218, *cert. denied*, 429 U.S. 859 (1976).

interest in protecting its resident defendant from a higher recovery. Moreover, the defendant's California insurance policy would be calibrated to the potential burdens of larger claims. Missouri had an interest in the standard of conduct for behavior within its borders, but its interest in limiting damages was solely to protect in-state defendants. It had no substantial interest in extending that protection to defendants from states with no such limitations, and Ohio, as the state where the decedents' estates were probated, did have a substantial interest in unlimited recovery. Therefore, Ohio's law as to the damages issue was applied.[67]

Subsequent cases indicate a further refinement of the governmental interest and false conflict methodology termed a "comparative impairment" approach.[68] This approach comes into practice only after a " 'preliminary analysis has identified a true conflict of the government interests involved.' " Once this preliminary step is satisfied, the court resolves a true conflict by " 'determin[ing] which state's interest would be more impaired if its policy were subordinated to the policy of the other state . . . . [T]rue conflicts should be resolved by applying the law of the state whose interest would be the more impaired if its law were not applied.' "[69]

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67. Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 731, 63 Cal. Rptr. 31, 35 (1967), *see* Hurtado v. Superior Court, 11 Cal. 3d 574, 581-83, 522 P.2d 666, 670-71, 114 Cal. Rptr. 106, 110-11 (1974) (false conflict between plaintiffs' state's limitation of damages and defendant's state's allowance of full recovery; full recovery allowed). The false conflicts methodology is also attributable to Professor Currie, as well as Professor Cavers, *see* B. Currie, *supra* note 62, at 189; D. Cavers, The Choice-of-Law Process 89-90 (1965), both of whom are extensively cited in *Hurtado*.

68. Offshore Rental Co., Inc. v. Continental Oil Co., 22 Cal. 3d 157, 165-66, 583 P.2d 721, 726, 148 Cal. Rptr. 867, 872 (1978); Bernhard v. Harrah's Club, 16 Cal. 3d at 321, 546 P.2d at 723-24, 128 Cal. Rptr. at 219-20 (1976).

69. Offshore Rental Co., Inc. v. Continental Oil Co., 22 Cal. 3d 157, 165-66, 583 P.2d 721, 726, 148 Cal. Rptr. 867, 872 (1978) (quoting *Bernhard*, *supra* note 68).

Among the relevant factors to be considered in determining choice of law under California's comparative impairment approach are the following:

(1) The status of the law — whether it is to be considered anachronistic or ascendant in the common law jurisdictions. " 'If one of the competing laws is archaic and isolated . . ., it may not unreasonably have to yield to the more prevalent and progressive law, other factors of choice being roughly equal.' "[70]

(2) Insurance and other planning for risks. Parties may be expected to plan their activities with insurance in mind, and that planning may affect the comparative fairness of two competing rules of liability.[71]

As we have mentioned, the district court divided the case against Piper into distinct issues, and ruled that a California court would apply its law as to one and Scottish law as to others. He then employed what conflicts scholars refer to as *depecage*, defined as "the process of applying the rules of different states to determine different issues in the same case."[72] Although the California Supreme Court has not explicitly adopted this method, it is implicit in that court's analysis of cases and it is consistent with modern governmental interest analysis to examine comparative governmental interests as to each issue, to the extent the issues are separable and the bal-

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70. *Id.* (emphasis deleted) (quoting Freund, *Chief Justice Stone and the Conflict of Laws*, 59 Harv. L. Rev. 1210, 1216 (1946)).

71. *Id.* at 167, 583 P.2d at 734, 148 Cal. Rptr. at 872.

72. Reese, *Depecage: A Common Phenomenon in Choice of Law*, 73 Colum. L. Rev. 58, 75 (1973); *see* Broome v. Antler's Hunting Club, 595 F.2d 921, 923 (3d Cir. 1979); R. Leflar, American Conflicts Law §109, at 221-22 (3d ed. 1977).

ance of comparative interests may vary.[73] We shall therefore examine separately the issues identified by the parties and the district court: the standard of liability, damages for wrongful death, and the capacity of the plaintiff to bring a wrongful death suit as a representative.

Any asserted conflict between American strict liability and Scottish negligence law is, we believe, a false one. Two basic policies underly theories of tort liability: deterrence of harm-causing conduct and compensation of persons injured by that conduct. In private tort law, in which civil rather than criminal liability is imposed, the deterrent function is accomplished by compensation of the plaintiff. The choice between holding a manufacturer liable only for negligence and holding it strictly liable for any dangerous products or design is, practically speaking, a matter both of searching for optimal deterrence of harmful conduct and of allocating the costs of injuries either to producers or consumers. A negligence standard is, broadly speaking, more protective of producers, while strict liability is more solicitous of consumers.

The perceived conflict in this case is between Scotland's interest in encouraging industry by protecting manufacturers and making it relatively more difficult for consumers to recover. Pennsylvania, by contrast, in adopting strict liability, has shifted some of the burdens of injuries from consumers to producers. By adopting this policy of increased deterrence, it hopes to make manufacturers more careful in production and design than they would be if held to a negligence standard.[74]

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73. *See* R. Leflar, *supra* note 72, at 222; Reese, *supra* note 72, at 75. The approach is also implicit in the analysis of Professor Cavers, whose work is often cited by the California Supreme Court. *See* D. Cavers, *supra* note 67, at 40-43.

74. In a recent case in which the California Supreme Court adopted comparative negligence into strict liability, the underlying policy of the latter was said to be to shift the cost of injuries from defective products from consumers to manufacturers. But the court

Applying Pennsylvania's strict liability standard to its resident manufacturer would serve that state's interest in the regulation of manufacturing. Scotland's interest in encouraging industry within its borders would not be impaired, however, by applying a stricter standard of care on a foreign corporation which has no industrial operations in Scotland. Furthermore, Scotland would have to interest in *denying* compensation to its residents for the purpose of benefiting a foreign corporation. Finally, imposition of strict liability on Piper cannot be said to be unfair to it. Inasmuch as Pennsylvania, the state in which Piper makes its product, and the vast majority of American jurisdictions in which most of Piper's aircraft are sold and fly, have strict liability,[75] that is the legal standard under which it plans its operations.

Pennsylvania's interest in deterring defects in products can be served without impairing any significant interest of Scotland. Application of Scotland's negligence

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emphasized that strict liability is not absolute liability and does not make the manufacturer an insurer of his product's safety. Daly v. General Motors Corp., 20 Cal. 3d 725, 733, 575 P.2d 1162, 1166, 144 Cal. Rptr. 380, 384 (1978). In addition to spreading the costs of accidents, strict liability is intended to increase a manufacturer's incentive to produce safe products. *See id.* at 737-38, 575 P.2d at 1169, 144 Cal. Rptr. at 387. *See* Calabresi, *Optimal Deterrence and Accidents*, 84 Yale L. J. 656 (1975) (strict liability better serves goal of optimal deterrence — minimization of accident and prevention costs); Calabresi & Hirschoff *Toward a Test for Strict Liability in Torts*, 81 Yale L. J. 1055, 1074-84 (1972) (shift from negligence to strict liability cannot be explained simply in terms of better distribution of costs; strict liability's appeal is also in greater deterrence of harmful conduct); *cf.* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L. J. 1121, 1122 (1960) (one argument that has convinced courts is that supplier of goods should be responsible for the harm they cause, regardless of fault).

75. *See, e.g.*, Wade, *On Product "Design Defects" and Their Actionability*, 33 Vand. L. Rev. 551, 555 (1980) (major point of controversy in America is no longer whether strict liability should be adopted, but what its precise standards should be).

law would only harm resident beneficiaries without any countervailing benefit to its industrial economy. We therefore conclude that, as between Pennsylvania and Scottish law on this issue, a California court would apply Pennsylvania's strict liability standard. Similar considerations would govern any greater restrictions on recovery for wrongful death that Scotland may have.[76]

The district court declined to make any definitive ruling on the issue of plaintiff 's capacity to sue because of the paucity of available information for balancing comparative governmental interests. 479 F. Supp. at 735. There was thought to be no need to decide this question, because the court concluded for other reasons that the action should be dismissed and brought anew in Scotland.[77]

Because we reverse the dismissal, it will be necessary for the trial judge to decide that issue based upon

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76. Courts employing governmental interest analysis have not struggled long to determine that a state where plaintiff but not defendant resides has no interest in restricting recovery for wrongful death of its citizens against foreign corporations. *See, e.g.*, Hurtado v. Superior Court, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974); *Cf.* Rosenthal v. Warren, 475 F.2d 438 (2d Cir.) (applying New York government interest analysis; New York forum would apply its own unlimited recovery rather than limitation of state of defendant where all tortious conduct occurred), *cert. denied*, 414 U.S. 856 (1973); Kuhne, *Choice of Law in Products-Liability*, 60 Calif. L. Rev. 1, 28 (1972) ("Under a governmental-interest approach, [a] proplaintiff tendency will be conceptualized . . . by imputing a greater state interest to recovery law than to those refusing recovery.")

77. On the choice of law issue as to representative capacity, the court stated: "We . . . only have affidavits from lawyers from Scotland as to what the rules of law are in that country and thus we cannot make . . . any defnitive ruling on the purpose of the Scottish law or thereby the choice of law." 479 F. Supp. at 735. It later concluded only that "it appears the law of Scotland would be applied to Defendant Piper with respect to the wrongful death laws. Under this interpretation Plaintiff would not be a proper litigant." *Id.* at 736.

additional information. If it is held that Reyno does not have representative capacity, it will be necessary to allow a substitution of parties so that the decedents' estates can bring the action directly. Such a substitution would not destroy diversity and should be granted in the interests of justice.[78]

Guiding the trial judge's decision should be the requirement of Fed. R. Civ. P. 17(b) that the capacity of an individual to sue in a representative capacity "shall be determined by the law of the state in which the district court is held."[79] In addition to examining the laws of California and Pennsylvania to determine whether Reyno has representative capacity,[80] the trial court should consider whether the defendants' challenge to the plaintiff's capacity to sue has come too late in the litigation.[81]

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78. Fed. R. Civ. P. 17(a); *see* Field v. Volkswagenwerk AG, No. 79-1710, slip op. at 24-25 (3d Cir. July 10, 1980).

79. Rule 17(b) in full provides:

> The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. *In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held,* except [(1) a special rule for partnerships and other unincorporated associations; and (2) bankruptcy receivers].

(emphasis added); *see* General Heat & Power Co. v. Diversified Mortgage Investors, 552 F.2d 556, 557 n.1 (3d Cir. 1977) (suggesting that Rule 17(b) encompasses the state's conflict of law rules under *Klaxon*); Jacobs v. Adams, 601 F.2d 176, 178-79 (5th Cir. 1979) (applying conflicts of laws rule to determine scope of power or right to bring suit).

80. The court "is held" in California as to Piper and in Pennsylvania as to Hartzell. *See* pp. 24-26 *supra*.

81. Fed. R. Civ. P. 9(a) requires that a party desiring to raise an issue as to "the capacity of any party to sue . . . or the authority of a party to sue . . . in a representative capacity . . . do so by specific negative averment." The federal rules do not make clear when in

b. *Pennsylvania Conflicts Law Applied to Hartzell*

Citing *Griffith v. United Airlines*,[82] the district court applied the "significant contacts" approach to determine that Scotland's standard of liability, rather than that of Ohio or Pennsylvania, applied to Hartzell.[83] But a close examination of *Griffith* and, more importantly, subsequent elaborations by the Pennsylvania Supreme Court reveals that Pennsylvania's approach to choice of law is quite similar, at least for purposes of this litigation, to that of California. Pennsylvania first looks to identify and thus avoid false conflicts, and then, when a true conflict is present, exmaines and compares the competing governmental interests.

In *Griffith*, the Pennsylvania Supreme Court overturned the old rule that the law of the state of wrong governs all issues in tort actions,[84] but it did not specifically

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NOTE 81 — *(Continued)*
the stage of a litigation lack of capacity must be averred, but because lack of capacity is a dilatory defense. Professors Wright and Miller state that it "should be raised promptly. Any unreasonable delay may encourage the court to deny the objection on the ground of prejudice." 6 C. Wright & A. Miller, Federal Practice and Procedures §1542, at 640 (1971) (footnote omitted). *See* 5 *Id.* §1295, at 397 (objection to party's capacity should be analogized to an affirmative defense and waived if not asserted early in the litigation by motion or responsive pleading). The record reveals that Reyno's capacity was not challenged by Piper until it joined Hartzell's motion to dismiss after the case had been transferred to the Middle District of Pennsylvania. This motion came after Piper had moved to remove the case from a California state court to a federal court, had filed its answer to the complaint, and had successfully moved to transfer the case to the Middle District of Pennsylvania.

82. 416 Pa. 1, 203 A.2d 796 (1964).

83. 479 F. Supp. at 736-37. All three jurisdictions have contacts with or interests in the alleged tort. Scotland is the residence of the decedents and the place of the fatal crash. Hartzell manufactured the allegedly defective propeller in Ohio and it was assembled into the Piper aircraft in Pennsylvania.

84. 416 Pa. at 21-23, 203 A.2d at 805-06.

set forth the contours of that rule's replacement. In fact, as the court later indicated, once governmental interests were examined *Griffith* involved a false conflict situation.[85] The state in which an airplane crashed was held to have no interest in enforcing its limitation of damages for wrongful death when neither party was a resident.[86]

The Pennsylvania Supreme Court noted three general approaches competing to replace the old rule: (1) Professor Currie's early emphasis on applying the forum's law when the forum has a legitimate interest in the issue presented;[87] (2) Professor Ehrenzweig's stress on the interests of the parties, specifically looking to whether the defendant would have planned by insurance for the risks to which he would be exposed by the applicable law;[88] and (3) the "significant contacts" approach of the Restatement (Second) of Conflicts, under which a court applies the law of the state with the most significant relationship with the occurrence and the parties.[89] Rather than choose among these alternative approaches, the Pennsylvania Supreme Court adopted what it believed was the essence of all three: "a more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court."[90]

Subsequent cases confirm that Pennsylvania courts follow a governmental interest analysis approach, with a state's contacts being considered significant only when

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85. Kuchinic v. McCrory, 422 Pa. 620, 624 & n.4, 222 A.2d 897, 899 n.4 (1966).

86. *Griffith*, 416 Pa. at 24, 203 A.2d at 807.

87. *Id.* at 14, 203 A.2d at 802 (citing Currie, *Comments on* Babcock v. Jacksons, 63 Colum. L. Rev. 1212, 1233 (1963)).

88. *Id.* (citing Ehrenzweig, *Comments on* Babcock v. Jackson, 63 Colum. L. Rev. 1212, 1243 (1963)).

89. *Id.* at 14-15, 203 A.2d at 802-03 (citing Restatement (2d) Conflict of Laws §§379, 389a (1971) and writings of its Reporter, Professor Reese).

90. *Id.* at 21, 203 A.2d at 805 (footnote omitted).

the behavior giving rise to the contact furthers or abrogates a state policy. Where the place of accident is fortuitious and the state where the accident occurred has no interest in the regulatory standard at issue, any conflict between that state and a state truly interested because, for example, it constituted the residency of the parties is, Pennsylvania appears to suggest, a false one.[91]

In *McSwain v. McSwain*, the court stated its approach as follows:

> Whether the policies of one state rather than another should be furthered in the event of conflict can only be determined within the matrix of specific litigation. What should be sought is an analysis of the extent to which one state rather than another has demonstrated, by reason of its policies and their connection and relevance to the matter in dispute, a priority of interest in the application of its rule of law.[92]

The latest discussion in *Cipolla v. Shaposka*[93] summarized the approach of the three cases discussed above as calling upon the court to determine which state "has the greater interest in the application of its law to the question now before us." Moreover,

> In determining which state has the greater interest in the application of its law, one method is to see what contacts each state has with the accident, the contacts being relevant only if they relate to the "policies and interests underlying the particular issue before the court." When doing this it must be

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91. Kuchinic v. McCrory, 422 Pa. at 624 & n.4, 222 A.2d at 899 & n.4.

92. McSwain v. McSwain, 420 Pa. 86, 94, 215 A.2d 677, 682 (1966) (citing *Griffith*, as well as California and New York cases).

93. 439 Pa. 563, 565, 267 A.2d 854, 855 (1970).

> remembered that a mere counting of contacts is not what is involved. The weight of a particular state's contacts must be measured on a qualitative rather than quantitative scale.[94]

These cases indicate to us that the primary approach of the Pennsylvania Supreme Court in choice of law is governmental interest analysis. Our determination as to whether the Pennsylvania court would apply American strict liability and unlimited recovery for wrongful death, rather than the negligence and damage limitations law of Scotland, therefore follows our prediction of California law. Indeed, the district court ruled that American standards of liability would control under governmental interest analysis applied as to California.[95] It is apparent, then, that the district court erred in concluding that foreign law would govern a substantial part of the case, and it is likewise apparent that the choice of law factor

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94. *Id.* at 566, 267 A.2d at 856 (quoting *Griffith*, 416 Pa. at 21, 203 A.2d at 805).

95. There is some difference between California and Pennsylvania, on the one hand, and Ohio on the other as to the standard of proof in strict liability. Ohio has adopted in full Restatement (2d) Torts 402A, subjecting to liability one who sells a product in a defective condition "unreasonably dangerous." *See, e.g.*, Temple v. Wean United, Inc., 50 Ohio St. 2d 317, 364 N.E.2d 267, 168 (1977) (Syllabus by the Court); *cf.* Anton v. Ford Motor Co., 400 F. Supp. 1270, 1273-76 (S.D. Ohio 1975) (reviewing products liability decisions of the Ohio Supreme Court). Pennsylvania and California have removed the "unreasonableness" requirement as being inconsistent with the policy of strict liability. *See e.g.*, Barker v. Lull Eng. Co., Inc., 20 Cal. 3d 413, 423-27, 573 P.2d 443, 449-52, 143 Cal. Rptr. 225, 231-34 (1978); Azzarello v. Black Bros. Co., 480 Pa. 547, 391 A.2d 1020 (1978). Indeed, our Court in interpreting Pennsylvania law has repeatedly held that use in a jury charge of the Restatement 2d's "unreasonably dangerous" language is reversible error. *E.g.*, Matlocks v. Daylin, Inc., 611 F.2d 30 (3d Cir. 1979); Bailey v. Atlas Powder Co., 602 F.2d 585 (3d Cir. 1979). Giving separate charges on the Ohio standard for Hartzell and the Pennsylvania standard for Piper need not necessarily confuse the jury.

weighted heavily in favor of dismissal for forum non conveniens.

E. *Other Elements of Public Interest*

We have held that under the applicable choice of law rules, Pennsylvania and Ohio are the jurisdictions with the greatest policy interest in this dispute. It follows that any other public interest factors that should be considered under the Supreme Court cases of *Gilbert* and *Koster* favor trial in this country rather than Scotland.

III. CONCLUSION

Because the defendants did not meet the burden required of them for a forum non conveniens dismissal, the judgment of the district court will be reversed and the cause remanded for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

EXHIBIT B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 79-2747

GAYNELL REYNO, as Personal Representative of the Estate of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott, *Appellant*

v.

PIPER AIRCRAFT COMPANY, a corporation; AVCO LYCOMING ENGINE GROUP, a Division of AVCO CORPORATION; HARTZELL PROPELLER, INC., a corporation

On Appeal From The United States District Court For The Middle District Of Pennsylvania
C. A. No. 77-1159

Argued May 22, 1980

Before: ADAMS, VAN DUSEN and HIGGINBOTHAM, *Circuit Judges*

Order Amending Opinion

It is ORDERED that the slip opinion filed July 24, 1980 in the above matter be and is hereby amended as follows:

Page 7, first paragraph
should read:

> At the time of the transfer motion, critical facts such as where various witnesses are, where the crash occurred, where the wreckage was located, and who owned the plane, were known. All that seems new was that a British administrative agency would investigate and report on the accident and that the decedents' estates would institute a separate action against the air taxi service in Scotland. Although these last facts are indeed relevant to a forum

non conveniens motion, they are hardly surprising or significantly new.

BY THE COURT,

ARLIN M. ADAMS
Circuit Judge

Dated: September 15, 1980.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 77-1159

GAYNELL REYNO, Personal Representative of WILLIAM FEHILLY, LIAM STUART FEHILLY, LIAM STUART FEHILLY, WILLIAM JAMES MCDOUGALL STORM, DAVID VINCENT MARAN and PETER CUNNINGHAM SCOTT, *Plaintiffs*

v.

PIPER AIRCRAFT COMPANY, a corporation; AVCO LYCOMING ENGINE DIVISION, a Division of Avco Corporation; HARTZELL PROPELLER, INC., a corporation, *Defendants*

Memorandum

(filed October 19, 1979)

This action arises out of an airplane crash near Tulla, Scotland on July 27, 1976 in which all persons aboard were killed. The Plaintiff, Gaynell Reyno, instituted this suit as the personal representative of five decedents, William Fehilly, Liam Stuart Fehilly, William James McDougal Strom, David Vincent Moran, and Peter Cunningham Scott. Gaynell Reyno seeks general damages for the heirs and next of kin of the above decendents and damages for funeral and burial expenses in this suit styled as one for wrongful death on the basis of products liability and negligence theories. The remaining Defendants, Piper Aircraft Company and Hartzell Propeller, Inc., were the manufacturers of the aircraft and propeller respectively. A number of motions are presently before the court, a motion to dismiss filed by Defendant Hartzell Propeller, a motion for judgment on the pleadings or for summary judgment filed by Piper Aircraft, and two motions to strike a responsive brief filed by the Plaintiff. After reviewing the extensive materials submitted by all parties, we have concluded that this action must be dismissed on the ground of *forum non conveniens*. This dismissal will

be conditioned on the Defendants abiding by their stipulation to submit to the jurisdiction of the courts of Scotland and their waiver of the Scottish statute of limitations.

Several issues were raised by the motions of the Defendants. Other than their main argument that the action should be dismissed under the doctrine of *forum non conveniens*, the Defendants also asserted that under applicable choice of laws rules that the law of Scotland would control this action and that pursuant to Scottish law, the Plaintiff neither has standing nor a right to proceed under the theory of strict tort liability. This question of the applicable law is interrelated with the analysis for *forum non conveniens* and because of our decision that the Defendants have shown overwhelming reasons for dismissal under this doctrine, we need not directly confront the standing and liability issues. The Plaintiff has also raised the question of estoppel which we have found to be unpersuasive.

Our primary attention therefore is focused on the factors applicable to the doctrine of *forum non conveniens* and the question whether we should exercise jurisdiction over this action brought by reason of an aircraft accident in Scotland, in which Scottish citizens who were passengers and a Scottish pilot, acting in the course of his employment with a Scottish Air Service, were killed while flying in Scottish airspace and when all decedents' survivors, the real parties in interest, are citizens and residents of Scotland and more particularly, when the only contact with Pennsylvania is that it was the site of the manufacture of the airplane involved in this litigation, not the propeller which was manufactured and designed in Ohio, over seven years prior to the date of the fatal accident. Too much has happened from the date the airplane left the plant of Piper Aircraft, which goes to the heart of the question of liability, that the contact with this forum with respect to this action can at best be described as plainly insignificant.

The procedural history of this case is important to our decision of dismissal. The action was instituted by Plaintiff Reyno in the Superior Court of the state of California for the

county of Los Angeles in July of 1977. After being removed to federal court in August of that year, Defendant Hartzell filed a motion to dismiss the action for lack of personal jurisdiction or in the alternative to transfer the action pursuant to 28 U.S.C. §1404(a). Defendant Piper then joined in Defendants Hartzell's motion to transfer the action on November 23, 1977. The District Court entered an order on December 21, 1977 granting Defendant Hartzell's motion to quash service of process and granting the motion to transfer this action to the United States District Court for the Middle District of Pennsylvania. The quashing of service of process to Hartzell was based on due process considerations set forth in INTERNATIONAL SHOE COMPANY v. WASHINGTON, 326 U.S. 310 (1945). The court did not dismiss the action against Defendant Hartzell since valid service against it was possible in the Middle District of Pennsylvania. The importance of the transfer of the action and the quashing of service against Hartzell lies in the applicable choice of laws rule that is relevant to each Defendant under rules of VAN DUSEN v. BARRACK, 376 U.S. 612 (1964) and KLAXON CO. v. STENTOR ELECTRIC MANUFACTURING, 313 U.S. 481 (1944).

The facts as noted center on the crash of an aircraft on July 27, 1976 in which the pilot and all passengers were killed in the navigable air space near Tulla, Scotland. The aircraft involved in the accident was a Piper Model TA-23 bearing British registration mark G-AYSF which was manufactured by Defendant Piper at Lock Haven, Pennsylvania. The plane's propeller was designed and manufactured by Defendant Hartzell Propeller, Inc. in Ohio. The aircraft was being piloted at the time of the accident by a Scottish citizen and resident, over mountainous terrain in southern Scotland. Subsequent to the manufacture of the aircraft involved in this accident it was sold and delivered to a purchaser in Ohio for use in the United States. By a chain of events, apparently still unknown to the Defendants, the plane came to be owned and operated by a Scottish air-taxy company in Scotland and the British Isles. The plane was owned, operated, maintained, and

serviced by the Scottish owner for several years preceding the accident of July 27, 1976. The British Department of Trade Investigation investigated the accident shortly after its occurrence. Presently, what remains of the wreckage is in the possession of the British Department of Trade Investigation.

The Plaintiff, Gaynell Reyno instituted this action as the personal representative of the estates of five of the decedents. All of these decedents were citizens and residents of the country of Scotland. Also, all heirs and next of kin, and all those persons entitled to recover by virtue of the deaths of the passengers, (if any recovery is decreed), are citizens and residents of the country of Scotland. Plaintiff Reyno is a citizen and resident of California and is not related to the decedents.

The Defendants assert that the accident was due to pilot error or improper maintenance and servicing of the aircraft and in this respect have stated their desire and inability to join the operating company by whom the pilot was employed, the pilot's estate, and the owner and maintainer of the aircraft. A lawsuit has been brought before the courts of Scotland naming as defendants the operating company, McDonald Aviation, Ltd., the owner of the plane, Air Navigation and Trading Company, Ltd., the executor of the pilot's estate, and the Civil Aviation Authority. Also an action was commenced in the courts of Great Britain against Piper Aircraft and Hartzell propellers along with MacDonald Aviation and Air Navigation and Trading Company by a personal representative of the sixth passenger in the aircraft at the time of the accident, the only passenger not represented by Gaynell Reyno in the instant action. Therefore at least one action is pending before the courts in the United Kingdom against the present Defendants and other involved parties.

We now begin with a discussion of the factors that we believe substantially point to the dismissal of this action under the doctrine of *forum non conveniens*. We have the inherent power to refuse jurisdiction over a case such as this one where the interests of justice require that the suit be brought in a

foreign country. GULF OIL CORPORATION v. GILBERT, 330 U.S. 501 (1947); DEMATEOS v. TEXACO, INC., 562 F.2d 895 (3d Cir. 1977), *cert. denied* 435 U.S. 904 (1978); FITZGERALD v. TEXACO, INC., 521 F.2d 448 (2d Cir. 1975) *cert. denied*, 423 U.S. 1052 (1976); DAHL v. UNITED TECHNOLOGIES CORPORATION, 1472 F. Supp. 696 (D. Del. 1979).

The general factors that we must consider in determining whether to dismiss an action for *forum non conveniens* were set forth by the Supreme Court in GULF OIL CORPORATION v. GILBERT, 330 U.S. 501 (1947). Mr. Justice Jackson enumerated in that decision numerous private and public interests that should be considered under the doctrine. The factors pertaining to the private interests of the litigants are the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive" *Id.* at 508. The public factors bearing on the question include the administrative difficulties flowing from court congestion, an interest in having local controversies decided at home, the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action, the avoidance of unnecessary problems and conflicts of law foreign to the Court, and the unfairness of burdening citizens in an unrelated forum with jury duty. *Id.* at 508-509.

The above cited factors have generally been followed by all courts presented with the issue of whether a case should be dismissed because a foreign forum is the more convenient one. *See, e.g.*, DEMATEOS v. TEXACO, INC., 562 F.2d 895, 899 (3d Cir. 1977); FITZGERALD v. TEXACO, INC., 521 F.2d 448, 450-51 (2d Cir. 1975); J. F. PRITCHARD AND CO. v. DOW CHEMICAL OF CANADA, 462 F.2d 998, 1000 (8th Cir. 1972); FITZGERALD v. WESTLAND MARINE CORPORATION, 369 F.2d 499, 501-02 (2d Cir. 1966); DAHL v. UNITED TECHNOLOGIES CORPORATION, 472 F. Supp. 696, 699 (D. Del. 1979); TOP

FORM MILLS v. SOCIEDAD NATIONALE INDUSTRIA, 428 F. Supp. 1237 1252-53 (S.D.N.Y. 1977); MICHELL v. GENERAL MOTORS CORPORATION, 439 F. Supp. 24, 26-27 (N.D.Ohio 1977); TEXACO TRINIDAD, INC. v. ASTRO EXITO NAVEGACION S.A., 437 F. Supp. 331, 332 (S.D.N.Y. 1977); FARMANFARMAIAN v. GULF OIL CORPORATION, 437 F. Supp. 910 923 (S.D.N.Y. 1977); DELRIO v. BALLENGER CORPORATION, 391 F. Supp. 1002, 1004 (D.S.C. 1975); DOMINGO v. STATES MARINE LINES, 340 F. Supp. 811, 814-13 (S.D.N.Y. 1972); MCCARTHY v. CANADIAN NATIONAL RAILWAYS, 322 F. Supp. 1197, 1199 (D.MASS. 1971); OLYMPIC CORPORATION v. SOCIETE GENERALE, 333 F. Supp. 121, 123-24 (S.D.N.Y. 1971). We have carefully read each of the above cited decisions and in light of these decisions and their analysis of the Gulf Oil factors, it is clear that it would be no less than an abuse of our discretion if we did not dismiss this action on *forum non conveniens* grounds as the Gulf Oil criteria overwhelmingly point to dismissal.

The first factor that we must consider is whether an alternative forum is open to the Plaintiff if this motion is dismissed. Generally, it has been stated by the courts that the doctrine of *forum non conveniens* presupposes that an alternative more appropriate and convenient forum is available. *See, e.g.*, DELRIO v. BALLENGER CORPORATION, 391 F. Supp. 1002, 1006 (D.S.C. 1978), TEXACO TRINIDAD v. ASTRO EXITO NAVEGACION S.A., 439 F. Supp. 331, 332 (S.D.N.Y. 1977); FARMANFARMAIAN v. GULF OIL CORPORATION, 1437 F. Supp. 910, 915 (S.D.N.Y. 1977). This principle is taken from the Gulf Oil decision in which it is stated "[i]n all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process. . . ." GULF OIL at 506-07. In the instant motion the Defendants have consented to submit to the jurisdiction of the Scottish courts of law and we have noted our intention of conditioning the dismissal of this action on their submission to the jurisdiction of such courts and their waiver of any statute of

limitation. Plaintiff has an alternative forum available to her and in fact a case is proceeding in the foreign courts already.

Next, we turn to the important factor of Plaintiff's choice of forum. As stated in GULF OIL, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed" *Id.* at 508. Here the Plaintiff's first choice was the California state Superior Court. Plaintiff relies on a number of cases under 28 U.S.C. §1404(a) in which the Plaintiffs were American citizens. This case, however, does not involve section 1404(a) as the determination rests on our inherent power to dismiss and it also does not involve Americans as real parties in interest. Rather, the Plaintiff is a representative of foreign citizens and residents seeking a forum in the United States because of the more liberal rules concerning products liability law.

Generally, the courts have been less solicitous when the plaintiff is not an American citizen or resident and, particularly when the foreign citizens seek to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States. As stated in FARMANFARMAIAN v. GULF OIL CORPORATION, 437 F. Supp. 910, 927 (S.D.N.Y. 1977), when a case involves a "claim of a foreign plaintiff, [his] choice of forum should be given less weight than the choice of an American plaintiff. . . ." And in OLYMPIC CORPORATION v. SOCIETE GENERALE, 462 F.2d 376, 378 (2d Cir. 1972), the court stressed that the balance of the Gulf Oil factors need not be as strong in favor of defendants when the plaintiff is not an American citizen. *See also*, OLYMPIC CORPORATION v. SOCIETE GENERALE, 333 F. Supp. 121, 124 (S.D.N.Y. 1971); MICHELL v. GENERAL MOTORS CORPORATION, 439 F. Supp. 24 (N.D. Ohio 1977).

Also, the plaintiff's choice of forum is generally given less weight when the forum selected is not the plaintiff's home jurisdiction. FITZGERALD v. TEXACO, INC., 521 F.2d 448, 451 (2d Cir. 1975); MCCARTHY v. CANDIAN NATIONAL RAILWAYS, 322 F.Supp. 1197, 1199 (D.Mass. 1971). In this case the real parties in interest, the heirs and next of kin of William

Fehilly, Liam Stuart Fehilly, William James McDougall Strom, David Vincent Moran, and Peter Scott, are not American citizens or residents, but rather, citizens and residents of Scotland. Since the real parties in interest are not American citizens, and the forums of either California or the Middle District are not in any way their "home" forum, this factor of plaintiff's choice of forum is entitled to little weight.

The next grouping of factors that we will weigh are the private interests of the litigants, including relative ease of access to sources of proof, availability of compulsory process, cost of obtaining willing witnesses, necessity of a view of the premises, and the site of the investigation of an accident. A review of the facts in this case illustrates that all such private interests point to Scotland as the appropriate forum for this litigation.

Nearly all events relevant to this action occurred outside of the Middle District of Pennsylvania. The only connection with this forum is the fact that the plane was manufactured here over seven years before the accident. The only contact with Plaintiff's choice of forum, California, is that Plaintiff's attorney and expert reside there. Convenience to counsel or to expert witnesses, it should be noted, is of small importance in the balancing of factors. See CAR-FRESHNER CORPORATION v. AUTO AID MANUFACTURING CORPORATION, 438 F. Supp. 82, 85 (N.D.N.Y. 1977). The connections with Scotland are overwhelming. The accident occurred in Scotland, the real parties in interest are citizens of Scotland, the decedents were all citizens of Scotland, the investigation of the accident occurred in Scotland, the aircraft was owned, operated, and maintained by a Scottish company, the pilot was Scottish, the wreckage remains in the possession of the foreign authorities, nearly all witnesses needed for the defense of this suit are located in Scotland, and all witnesses to damages are located in Scotland.

The ease of access to proof element strongly points to dismissal of this action. First, all evidence as to damages, both witnesses and documents, is located in Scotland. Ease of

access to sources of proof of damages is an important factor in a wrongful death action. DOMINGO v. STATES MARINE LINES, 340 F. Supp. 811, 815 (S.D.N.Y. 1972). Furthermore, nearly all witnesses necessary for the defense to this suit are located in the British Isles. For example, witnesses regarding the maintenance of the aircraft are in Great Britain, witnesses concerning the training of the pilot are located there, and witnesses relating to the investigation of the accident are in the British Isles. None of these witnesses are subject to compulsory process. Clearly, these witnesses are critical to this case and since they are located in Scotland, it would be more convenient for the witnesses and less costly for the litigants to litigate this matter in Scotland. *See*, FITZGERALD v. TEXACO, INC., 521 F.2d 448, 451 (2d Cir. 1975); DAHL v. UNITED TECHNOLOGIES CORPORATION, 472 F. Supp. 696, (D.Del. 1979); DOMINGO v. STATES MARINE LINES, 340 F. Supp. 811, 815 (S.D.N.Y. 1972); TOP FORM MILLS v. SOCIEDAD NATIONALE INDUSTRIA, 428 F. Supp. 1237, 1253 (S.D.N.Y. 1977); J.F. PRITCHARD & CO. v. DOW CHEMICAL OF CANADA, 462 F.2d 998, 1002 (8th Cir. 1972); DELRIO v. BALLENGER CORPORATION, 391 F. Supp. 1002, 1004 (D.S.C. 1975).

Plaintiff relies on the argument that the essential elements needed for proof of her case are present in this forum since the plane was designed and manufactured here. We note that the alleged defective component part, the propeller, was designed and manufactured outside of this forum. Also the aircraft was manufactured over seven years prior to the accident and evidence of any changes in the plane is located in Scotland. Even Plaintiff admits that all witnesses to damages reside in Scotland. Furthermore, we cannot accept Plaintiff's argument that the evidence going to legitimately raised defenses is irrelevant to our determination. The interests of justice require that a trial be fair to all parties, not just the Plaintiff.

While there are no doubt numerous cases that have reached this same conclusion based on fundamental fairness, we will specifically point to just two. The first case we rely on

is MICHELL v. GENERAL MOTORS CORPORATION, 439 F. Supp. 24 (N.D. Ohio 1977). In MICHELL the court held that mere design and manufacture of an infant seat in Michigan was not crucial in the balancing of factors and it dismissed the suit on *forum non conveniens* grounds where the injury was to Canadian plaintiffs, involved a Canadian accident, when presentation of Canadian witnesses was necessary and could not be guaranteed in the United States. *Id.* at 25-26. All of these factors are present in the instant case and like the MICHELL court, we find the evidence relating to design in this action to be overwhelmed by the evidence needed from Scottish sources.

The second case on point on this question is DAHL v. UNITED TECHNOLOGIES CORPORATION, 472 F. Supp. 696 (D. Del. 1979). DAHL was brought in Delaware by the personal representative of four Norwegians who died in a crash of a Norwegian owned and operated helicopter in Norwegian territorial waters against the helicopter manufacturer on the basis of design and manufacture defects. Chief Judge Latchum discussed the nearly identical factual pattern as we have here in the following manner:

> . . . a substantial amount of the testimonial evidence will come from Norwegians. Testimony from persons who knew the decedents will be relevant to the damages issue. Among the potential liability witnesses are employees of Helikopter Service AIS, employees from other firms in Norway that serviced or made installations on the helicopter, and the Norwegian government officials who investigated the accident.

Id. at 700. We think the chief judge was absolutely correct, that we must look to all evidence that is necessary for a fair trial and in this case the place to find such evidence is Scotland.

Interrelated with the above discussion is the fact that the witnesses and other evidentiary materials that are located in Scotland are beyond the reach of compulsory process of this

court. The unavailability of compulsory process to compel the attendance of witnesses necessary for a complete and fair trial has been recognized as a critical factor in the dismissal of cases for *forum non conveniens*. *See e.g.*, FITZGERALD v. TEXACO, INC., 521 F. 2d 448, 451 (2d Cir. 1975): FITZGERALD v. WESTLAND MARINE CORPORATION, 369 F.2d 499 (2d Cir. 1966); DAHL v. UNITED TECHNOLOGIES CORPORATION, 472 F. Supp. 696, 700 (D.Del. 1979); MICHELL v. GENERAL MOTORS CORPORATIONS, 439 F. Supp. 24, 27 (N.D.Ohio 1977); TEXACO TRINIDAD, INC. v. ASTRO EXITO NAVEGACION S.A., 437 F. Supp. 331 (S.D.N.Y. 1977); DELRIO v. BALLENGER CORPORATION, 391 F. Supp. 1002, 1004 (D.S.C. 1975); DOMINGO v. STATES MARINE LINES, 340 F. Supp. 811, 815 (S.D.N.Y. 1972).

Finally, the absence of necessary third parties weighs heavily on our determination that the Middle District is not a suitable forum for this litigation. The Defendants have pursuasively argued that persons located in Scotland ought to be made parties to this suit. These include the pilot, the owner of the plane, and the operating company. Since the Defendants in this action cannot implead these necessary parties it would be unfair to make Piper and Hartzell proceed to trial in this forum. This inability to implead parties located in foreign counties has likewise been viewed as a critical factor by the courts. *See e.g.*, GULF OIL CORPORATION v. GILBERT, 330 U.S. 501, 511 (1946); TEXACO TRINIDAD, INC. v. ASTRO EXITO NAVEGACION S.S., 437 F. Supp. 331, 334 (S.D.N.Y. 1977); FITZGERALD v. TEXACO, INC., 521 F.2d 448, 453 (2d Cir. 1975); FITZGERALD v. WESTLAND MARINE CORPORATION, 369 F.2d 499, 502 (2d Cir. 1966); OLYMPIC CORPORATION v. SOCIETE GENERALE, 333 F. Supp. 121, 124 (S.D.N.Y. 1971); DOMINGO v. STATES MARINE LINES, 340 F. Supp. 811, 816 (S.D.N.Y. 1972). These potential defendants could be reached in Scotland and in fact they have been joined with the instant Defendants in a suit in the British Isles. Certainly it would be fairer to all parties and less costly if the entire case was presented to one jury with available testimony from all relevant witnesses.

The last factor that we will discuss pertaining to the private interests is the necessity of a view. More generally, we believe this factor of Gulf Oil requires us to consider, as many courts have done, where the accident or event took place. All facts relevant to the crash are in Scotland, other than the fact that the manufacture and design of the plane occurred in the United States seven years before. If weight should be assigned to this "view" criteria, it certainly favors the Defendants. Familiarity with the topography around Tulla, Scotland and inspection of the wreckage of the plane would be aided by a trial in the British Isles where the accident occurred.

We now will look to the factors concerning the public interest which we believe even more strongly point to dismissal. These factors include court congestion, local interest in the lawsuit, court familiarity with the law that will govern the action, the avoidance of unnecessary problems and conflicts of law foreign to the court and the unfairness of burdening citizens in an unrelated forum with jury duty. GULF OIL CO. v. GILBERT, 330 U.S. 501, 507-09 (1946); DEMATEOS v. TEXACO, INC., 562 F. 2d 895, 899, n. 2 (3d Cir. 1977); MICHELL v. GENERAL MOTORS CORPORATION, 439 F. Supp. 24, 27 (N.D. Ohio 1977).

Uppermost in our weighing of these public interest factors is that a trial in this forum would be hopelessly complex and confusing for a jury as different laws will apply to different parties. From our review of the applicable choice of law rules, it appears that Pennsylvania law would apply to Defendant Piper and that Scottish law would apply to Defendant Hartzell.

The law is clear that we must apply the choice of law rule of the state in which we sit, Pennsylvania. KLAXON CO. v. STENTOR ELECTRIC MANUFACTURING, CO., 313 U.S. 487 (1941). However, when a case is transferred pursuant to 28 U.S.C. §1404(a), we then apply the choice of law rules of the state from which the case was transferred. VAN DUSEN v. BARRACK, 376 U.S. 612 (1964). Thus in this case we must

apply the California choice of law rules to Defendant Piper. In applying the choice of law rules of California we have three choices of law, California, Pennsylvania, and Scottish. With respect to Defendant Hartzell, the applicable law is not as easily arrived at.

Defendant Hartzell as previously noted, was found to have insufficient contact with the state of California and service was quashed. The District Court of California did not dismiss the action to Defendant Hartzell, but instead properly transferred the action to this forum. We use "properly" in the sense that the court had the power to transfer the action as to Defendant Hartzell even though service was quashed. Plaintiff argues that the Van Dusen rule applies to Hartzell as well as Defendant Piper, however, for the reasons that follow, we cannot accept this assertion.

The purpose of the Van Dusen rule was to prevent a party from obtaining a change in the law that would be applied to a case by seeking a transfer of the action. In essence, the Van Dusen Court ruled that a transfer under section 1404 should result in a change of courtrooms only, not a change in the applicable law. In the instant case the district court of California held that the law of California could not apply to Defendant Hartzell because of insufficient contacts with that state. The question we are presented with is whether the Plaintiff in this action can capture the law of California under Van Dusen for transportation to this district and have it apply to Defendant Hartzell when service against Defendant Hartzell was improper in California. We hold that Plaintiff cannot accomplish this. Simply, the Plaintiff cannot take advantage of the law of California when she could not properly obtain jurisdiction over Defendant Hartzell there. Thus, to Hartzell we must apply Pennsylvania choice of law rules.

First, we will briefly discuss whether California choice of law rules require that we apply California, Pennsylvania, or Scottish law to Defendant Piper. California courts follow the governmental interest approach in resolving conflict of law

issues. REICH v. PURCELL, 67 Cal. 2d 551, 432 P2d 727 (1967); HURTADS v. SUPERIOR COURT, 11 Cal. 3d 574, 522 P.2d 666 (1974). As Plaintiff states in her brief the "governmental interest approach differs greatly from the significant contacts approach utilized in Pennsylvania." The governmental interest approach, in determining the law applicable in a California forum, applies to situations involving a foreign country and the choice between the two. HURTADO v. SUPERIOR COURT, 11 Cal. 3d 574, 522 P.2d 666 (1974). The objective of the analysis is to determine the law that most appropriately applies to the issue involved.

The governmental interest approach involves three steps of analysis. First, the applicable legal issue and law must be identified. Second, the state interest underlying the law must be determined. Third, it must then be determined if that interest would be furthered through application of the states' law to resolve the specific issues involved in the case. We intend to make no definitive ruling on what law will apply under the California governmental interest analysis. Rather, our discussion will go only so far as to hold that either Pennsylvania or Scottish law will apply under the California choice of laws rules. We are relegated to this less that complete analysis because of our unfamiliarity with Scottish law which in itself is a factor supportive of dismissal of the action.

Areas of conflict are present between these three jurisdictions, i.e. Pennsylvania, California, and Scotland. First, Scottish law does not allow a personal representative to bring an action of this kind in Scotland. Under Scottish law, a personal representative may only bring an action for funeral expenses. Otherwise, an action of this type may be brought only by the deceased's relatives or dependents. We have previously stated that Gaynell Reyno meets neither of *these requirements*. Both Pennsylvania and California appear to permit such suits. Second, the law of Scotland has not adopted and does not recognize the theory of strict products liability. *The only basis* for liability in Scotland for the

manufacturer of a defective product is negligence. In contrast, both Pennsylvania and California recognize strict liability.

What interests of the state these laws promote must be identified by reference to the interpretations of the laws by the respective forum courts. California courts have held that the states interest in creating a cause of action for wrongful death lies in governing the distribution of proceeds to beneficiaries and also the interest of deterring conduct within its borders that takes life. HURTADO v. SUPERIOR COURT, 114 Cal. 3d 574, 522 P.2d 666 (1974). For the purposes of this discussion we will assume that similar interests are promoted by the Pennsylvania laws. Since the accident did not occur in either Pennsylvania or California and because none of the decedents were residents of either of these states, it would appear that the application of either Pennsylvania or California law would not further the purpose of the wrongful death laws. If the purpose of the Scottish law, permitting recovery for relatives of decendents, is similar, it would seem that its interests would be furthered by the application of the law of Scotland.

Particularly, this is true with respect to the rule of law in Scotland that only relatives or dependents of a deceased may bring an action of the type of the instant action and not a personal representative unrelated to the decedent. We, however, only have affidavits from lawyers from Scotland as to what the rules of law are in that country and thus we cannot make, as we said before, any definitive ruling on the purpose of the Scottish law or thereby the choice of law. We do agree with the Plaintiff that in line with the California decisions, that the restrictions on recovery that exist in Scotland would generally not be applied in a choice of laws situation as the foreign country would likely have no interest in restricting any recovery its citizens might receive in foreign courts from foreign defendants. See, HURTADO v. SUPERIOR COURT, 114 Cal. 3d 574, 522 P.2d 666 (1974). We do not believe the provisions restricting suits of this nature to relatives of the decedents fall within this general principle

however. Such a restriction would likely be for the purpose of insuring that suits are brought by persons interested in the action so that competence of counsel and administration of a suit are in the hands of those parties with the ultimate interest.

We therefore return to our previously enunciated conclusion that the law of California would not be applied under the choice of law rules of California as that state has no interest in having its laws apply. Plaintiff admits this fact. Furthermore, we believe that Pennsylvania also has no governmental interest in having its wrongful death laws apply. For the protection of the real parties in interest in this suit we believe that the application of Scottish law would further the purpose of the laws of Scotland with respect to the restrictions on proper plaintiffs. We believe that the California courts would therefore apply the law of Scotland to this suit. Even if we assume that the Plaintiff is correct and that Pennsylvania law would be applied by the California courts to this case, this does not aid the Plaintiffs position.

There exists a conflict among the three forums in the law of products liability. Scotland only recognizes negligence as a basis for liability while the two states apply the rule of strict liability. California has no interests in having its products liability law apply and thus under the California choice of law rules it would not apply its own law. See, BERNHARD v. HARRAH'S CLUB, 16 Cal. 3d 313, 546 P.2d 719 (1976); REICH v. PURCELL, 67 Cal. 2d 551, 432 P.2d 727 (1967). Our choice is thus between Scottish law and the law of Pennsylvania.

The law of Scotland in not recognizing strict liability is more limited in terms of liability than Pennsylvania. Generally, such a restriction provides an indication that the law seeks to limit the liability of its resident manufacturers to those cases where negligence can be shown; that only culpable conduct will result in liability. If the only purpose of the requirement of proof of negligence is to aid manufacturers in Scotland, then we may assume that the purpose of the law will not be furthered by applying it to American manufacturers.

Pennsylvania's interests in recognizing strict liability is foremost in ensuring that citizens will be compensated for injuries resulting from defective products. There does exist in the imposition of strict liability on manufacturers an element of deterence. While the element of compensating injured residents outweighs the deterence factor, at least some slight interest on the part of the state of Pennsylvania would be furthered if the law of Pennsylvania were applied to Defendant Piper. No Pennsylvania governmental interest, however, would be promoted by the application of Pennsylvania law to Defendant Hartzell. Since none of the decedants nor their relatives were Pennsylvania citizens, Pennsylvania's interest in compensating its injured citizens is of little weight. While the interest of Pennsylvania in applying its laws is indeed slight, neither of the other forums has any apparent interest in applying their laws and we therefore assume that California courts would apply Pennsylvania law under the choice of law rules of California.

In summary, under the California choice of law rules, it appears the law of Scotland would be applied to Defendant Piper with respect to the wrongful death laws. Under this interpretation, Plaintiff would not be a proper litigant. Second, the strict liability law of Pennsylvania would likely apply to Defendant Piper and not the negligence law of Scotland.

Next, we will briefly review the law that should apply to Defendant Hartzell under Pennsylvania choice of law rules. As Plaintiff accurately points out in her brief, the courts of Pennsylvania follow the significant contacts approach. In GRIFFITH v. UNITED AIRLINES, 416 Pa. 2d 1, 203 A.2d 796 (1964), the Supreme Court of Pennsylvania adopted the rule of the Restatement Second of Conflicts of Laws, section 145, which states that in a tort action, the rights and liabilities of the parties are determined by the local law which has the most significant relationship to the occurrence or to the parties. "To determine which law has the most significant relationship, the court is instructed to consider: the place

where the injury occurred; the place where the conduct causing the injury occurred; the domicile, residence, place of incorporation, or the place of business of the parties; and the place where the relationship between the parties is centered." LEWIS v. CHEMETRON CORPORATION, 448 F. Supp. 211, 212 (W.D. Pa. 1978); ZURZOLA v. GENERAL MOTORS CORPORATION, 503 F.2d 403 (3d Cir. 1974); SAMUELSON v. SUSEN, 576 F.2d 546 (3d Cir. 1978). Any analysis of the relevant contacts in the instant suit leads to the inevitable conclusion that the courts of Pennsylvania would apply the law of Scotland to this action.

To reiterate some of the crucial aspects of the contacts, we begin with the fact of the accident in Scotland. The conduct giving rise to the injury occurred in one of three places, Ohio, Pennsylvania, or Scotland. The real parties in interest are domiciled in Scotland, are residents of Scotland, while the Defendants are located in Ohio and Pennsylvania. We will not outline the contact in any more detail as we find the weight of the contacts with Scotland to be overwhelming. We hold that the law of Scotland would apply in the instant action to Defendant Hartzell.

We will now once again turn our attention to the public interest factors of Gulf Oil. As Gulf Oil recognized an extremely important factor in the balance of interests is the fact that foreign law will govern all or part of a case. 330 U.S. at 508; *see also*, FARMANFARMAIAN v. GULF OIL CORPORATION, 437 F. Supp. 910, 924 (S.D.N.Y. 1977); DOMINGO v. STATES MARINE LINES, 340 F. Supp. 811, 816 (S.D.N.Y. 1972); MICHELL v. GENERAL MOTORS CORPORATION, 439 F. Supp. 24, 27 (N.D. Ohio 1977); DELRIO v. BALLENGER CORPORATION, 391 F. Supp. 1002, 1004 (D.S.C. 1975); FITZGERALD v. WESTLAND MARINE CORPORATION, 369 F.2d 499, 502 (2d Cir. 1966); MCCARTHY v. CANADIAN NATIONAL RAILWAYS, 322 F. Supp. 1197 (D. Mass. 1971). We have determined that Scottish law will govern part of this case. We, of course, are not familiar with the law of Scotland and would have to rely on experts from that country. *See*,

FITZGERALD v. TEXACO, INC., 521 F. 2d 448 (2d Cir. 1975). Clearly, it would be better for all parties for this case to proceed in a court in Scotland that is at home with the law of that country. This case is further complicated by the fact that different laws would apply to different parties. The result of this would no doubt cause hopeless confusion and would likely lead to inconsistent or an inequitable result if a trial were held here. Dismissal of this action avoids unnecessary probelems of conflict of laws and the application of foreign law.

Another factor that Gulf Oil suggests that we consider is the unfairness of burdening citizens in this forum with jury duty when this forum has little connection with the controversy. The only connection with this forum is that the plane was manufactured in this district years before this accident. Trial of this case would take weeks and we do find that it would be an unfair burden to impose this on the citizens in this community. Also, it would be a huge burden on this court in terms of both time and the costs involved. Our court is too congested for us to try an action that belongs in a foreign forum. *See*, Gulf Oil at 508509; DELRIO v. BALLENGER CORPORATION, 391 F. Supp. 1002, 1005 (D.S.C. 1975); MITCHELL v. GENERAL MOTORS CORPORATION, 439 F. Supp. 24, 28 (N.D. Ohio 1977); DOMINGO v. STATES MARINE LINES, 340 F. Supp. 811, 816 (S.D.N.Y. 1972); DAHL v. UNITED TECHNOLOGIES CORPORATION, 472 F. Supp. 696, 701 (D. Del. 1979).

If we attempted to try this action in this forum the administrative and legal difficulties would be extreme. The legal problems include determining the serious and complex conflict of law questions, which this memorandum has only touched on. Likewise, the large numbers of witnesses that would be needed from Scotland, the British Isles, Ohio, and California would likely cause administrative difficulties. The physical evidence is in Scotland or the British Isles. We also note that Scotland has a large interest in the outcome of this litigation as it occurred in its airspace. The case thus may

shed light on considerations which affect the safety of its citizens. *See*, FITZGERALD v. TEXACO, INC., 521 F.2d 448 (2d Cir. 1975)). All of these matters lead us to conclude that the public interest would be better served by a trial in Scotland.

That the law of Scotland is not as helpful to the real parties in interest is not a weighty consideration. We must determine which forum is proper because of convenience and the interests of justice and the decision cannot be correctly made if the amount of a plaintiff's likely award is given undue weight. Generally, the cases that have been dismissed on the ground of *forum non conveniens* all involve situations where a party enters a forum with the hope of seeking more liberal rules of recovery. If the foreign law that ought to govern a case does not protect its citizens as fully as the law of the dismissing forum, that is a matter to be dealt with in the foreign forum. *See e.g.*, MICHELL v. GENERAL MOTORS CORPORATION, 439 F. Supp. 24, 27 (N.D. Ohio 1977); TEXACO TRINIDAD v. ASTRO EXITO NAVEGACION S.A., 437 F. Supp. 331, 333-34 (S.D.N.Y. 1977); FITZGERALD v. TEXACO, INC., 521 F.2d 448, 453 (Id Cir. 1975).

The Plaintiff by brief and at oral argument asserted that the Defendants should be estopped from seeking dismissal of this action on *forum non conveniens* grounds. No cases are cited in support of that proposition and we believe that is a sufficient indicator of the merit of that argument. Plaintiff argues that since the case has been transferred once before and for the reasons stated by Defendants in their briefs that they should now be estopped from arguing that the Middle District is not a proper forum. A reading of the briefs filed by Plaintiff in response to the transfer motion, in accordance with this argument, would lead us to conclude that Plaintiff should be estopped from raising this argument. The papers filed concerning the motion to transfer are, of course, irrelevant to the question we have decided. They were filed early on in this proceeding before many of the important facts of this case were uncovered. Also, Defendants should not be punished for their failure to file a motion to dismiss for

forum non conveniens first, instead of the motion to transfer. If they would have filed such a motion we feel sure that the California district court would have likewise dismissed this action.

The action will be dismissed on the conditions that the Defendants waive any defense that they might have relating to any statute of limitations that did not exist prior to the initiation of this suit and that they abide by their stipulation to submit to the jurisdiction of the Scottish courts,

An appropriate order will be entered.

/s/ R. DIXON HERMAN
R. Dixon Herman
United States District Judge

Dated: October 19th 1979

EXHIBIT D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 79-2747

GAYNELL REYNO,as Personal Representative of the Estate of William Fehilly, Liam Stewart Fehilly, William James McDougall Storm, David Vincent Moran, and Peter Cunningham Scott, *Appellant*

v.

PIPER AIRCRAFT COMPANY, a corporation; AVCO LYCOMING ENGINE GROUP, a Division of AVCO CORPORATION; HARTZELL PROPELLER, INC., a corporation

(D.C. Civil No. 77-1159)

On Appeal From The United States District Court For The Middle District Of Pennsylvania

Present: ADAMS, VAN DUSEN and HIGGINBOTHAM, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel, on May 22, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 19, 1979, be, and the same is hereby reversed and the cause is remanded for further proceedings consistent with the opinion of this Court. Costs taxed against appellees.

ATTEST:

_____

Clerk

July 24, 1980.

Certified as a true copy and issued in lieu of a formal mandate on September 4, 1980.

Test: SALLY MRVOS

Clerk, United States Court of Appeals for the Third Circuit

Costs taxed in favor of appellant as follows:

Clerk's fees	$ 65.00
Brief	1,207.87
Reply Brief	98.58
TOTAL .	$1,371.45

EXHIBIT E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 79-2747

GAYNELL REYNO,etc., *Appellant*

v.

PIPER AIRCRAFT COMPANY, et al.,

(C.A. No. 77-1159)

SUR PETITION FOR REHEARING

En Banc

Present: SEITZ, *Chief Judge,* VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, AND SLOVITER, *Circuit Judges*

The petition for rehearing filed by Appellee, Hartzell Propeller, Inc., in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Circuit Judge

Dated: August 27, 1980

EXHIBIT F

IN THE UNITED STATES DISTRICT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 77-1159

GAYNELL REYNO, Personal Representative of WILLIAM FEHILLY, LIAM STUART FEHILLY, WILLIAM JAMES MCDOUGALL STORM, DAVID VINCENT MORAN and PETER CUNNINGHAM SCOTT

v.

PIPER AIRCRAFT COMPANY, A Corporation; AVCO LYCOMING ENGINE DIVISION, A Division of Avco Corporation; HARTZELL PROPELLER, INC., A Corporation

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA :
:SS.
COUNTY OF LYCOMING :

CHARLES J. MCKELVEY, first being sworn, deposes and says that he is an attorney with the firm of McNerney, Page, Vanderlin & Hall, located in Williamsport, Pennsylvania and represents Piper Aircraft Corporation in the above matter; that he is familiar with the suit on behalf of Gaynell Reyno and has undertaken an investigation of the facts involved in this litigation, and the facts set forth below are true to the best of his information, knowledge and belief:

1. Defendant Piper Aircraft Corporation has formulated its preliminary plans as to who it will call as witnesses in the trial of the above-referenced case, assuming the Defendant Piper could compel the attendance of all such persons. Defendant Piper's intentions as to who it will call as witnesses are, of course, subject to change with further developments and discoveries in this case, and Piper does not intend the within list to be its final witness list.

2.Defendant Piper would call as witnesses the members of the families of the decendents and the heirs and next of kin of the decendents to testify on the issue of damages. These persons would be Defendant's only witnesses on this issue. Defendant Piper does not know at the present time the names of all such family members, but will seek to obtain the same through further discovery and further investigation of this case in Scotland.

3. Defendant Piper would call as witnesses the owners and employees of the Scottish air-taxi company which owned and operated the aircraft and hired the pilot. The testimony of these witnesses would concern the cause of and liability for this accident. All such persons are residents and citizens of Scotland. Defendant Piper does not now know the names of all such persons, but intends to ascertain the same through further investigation of this case in Scotland.

4. Defendant Piper would call as witnesses the persons who were responsible for the training and licensing of the pilot of this aircraft. The testimony of these witnesses would concern the cause of the accident and the liability thereof. All such persons are residents and citizens of Scotland. Defendant Piper does not now know the names of all such persons, but intends to ascertain the same through further investigation of this case in Scotland.

5. Defendant Piper would call as witnesses the persons responsible for servicing and maintaining the aircraft involved in this accident for the preceeding several years. All such persons are residents and citizens of Scotland. Defendant Piper does not now know the names of all such persons, but intends to ascertain the same through further investigation of this case in Scotland. These witnesses' testimony would be directed to the cause of and the liability for this accident.

6. Defendant Piper would call as witnesses two or three of its employees who were involved in the design and/or manufacture of this aircraft. Their testimony would be directed to the issue of liability. These witnesses are located either in Pennsylvania or Florida.

/s/ CHARLES J. MCKELVEY
Charles J. McKelvey

Sworn and subscribed before me this 30th day of May, 1978.

/s/ ALICE J. ANDREWS
Notary Public

My Commission Expires:

ALICE J. ANDREWS, Notary Public
Williamsport, Lycoming Co., Pa.
My Commission Expires Dec. 21, 1981

(SEAL)